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In the Supreme Court of the United States

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOHN DOE AND JANE DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35419

JOHN DOE AND JANE DOE, PLAINTIFFS-APPELLEES

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

[Argued and Submitted Feb. 7, 2002
Filed: May 29, 2003]

OPINION

Before: CANBY, JR., BERZON,* and TALLMAN, Circuit Judges.

BERZON, Circuit Judge:**

Jane and John Doe—fictitious names, adopted for this litigation for reasons that will appear—assert that they performed espionage activities on behalf of the

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* Pursuant to General Order 3.2g, Judge Berzon was drawn to replace Judge Henry A. Politz. Judge Berzon has read the briefs, reviewed the records, and listened to the tape of oral argument.

** Part II of the opinion is authored by Judge Canby.

United States against a former Eastern bloc country. The Central Intelligence Agency (the "CIA"), they say, assured them that it would provide assistance in resettling in the United States as well as lifetime financial and other support. According to the Does, the CIA has now reneged on its obligation of support. The United States will neither confirm nor deny the Does' allegations, for reasons of national security.

We must decide whether the Does can sue the CIA for the alleged wrongs committed by the Agency, or whether, instead, their action is either appropriate only in the Court of Federal Claims or precluded by the venerable doctrine enunciated in *Totten* v. *United States*, 92 U.S. 105, 23 L. Ed. 605 (1875).

I

We assume, without deciding, that the facts as alleged by the Does are true and construe the complaint in the light most favorable to their case. See *Burgert* v. *Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). The facts that appear in this opinion, with the exception of procedural history in federal court, are all, therefore, simply allegations, even when not stated as such.

The Does allege that they were citizens of an Eastern bloc country formerly considered an adversary of the United States. During his tenure as a high ranking diplomat for that country during the Cold War, Mr. Doe approached a person associated with the United States embassy and requested assistance in defecting to the United States.

The Does recount that after this request was made, CIA agents took them to a "safe house" for approximately twelve hours. The CIA officers employed intimidation and coercion to convince the Does to remain instead at their diplomatic post and to engage in espionage for the United States. The agents told the Does that if they agreed to conduct espionage on behalf of the United States, the CIA would arrange for their resettlement in the United States and ensure their financial and personal security "for life." The Does further allege that the agents assured them that this assistance was approved at the highest level of authority at the CIA and was mandated by U.S. law.

The Does state that although they were initially reluctant to conduct espionage activities, they eventually agreed to do what was asked of them. They allege that they carried out their end of the bargain but that the Agency has now reneged and abandoned them to fend for themselves.

The Does represent that they entered the United States under the special provisions of the "PL-110 Program."[1] Pursuant to that program, the CIA provided

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[1] PL-110 refers to the original public law number of the Central Intelligence Act of 1949. As used by the parties to this litigation, PL-110 refers to an alleged program emerging from a section of that statute, now codified at 50 U.S.C. § 403h:

> Whenever the Director [of Central Intelligence], the Attorney General, and the Commissioner of Immigration and Naturalization shall determine that the admission of a particular alien into the United States for permanent residence is in the interest of national security or essential to the furtherance of the national intelligence mission, such alien and his immediate family shall be admitted to the United States for permanent residence without regard to their inadmissibility under the

them with false identities and backgrounds and offered to "retire" them with financial and health benefits. The Does allege that the Agency provided them with various benefits, including health care and education. Because the Does desired to "become integrated into American society," they requested that the CIA assist them in obtaining employment. They claim that the CIA continued to assure them that, to the extent that their earned income was insufficient to meet their needs, they would be supported by the Agency for the remainder of their lives with a "safety net," which was "required by law." The Does allege that they were told that such support was required on the basis of their classification as "PL-110s."

The Does eventually settled in the Seattle area, and were initially provided with a stipend of $20,000 per year, as well as housing and other benefits. Over time, their stipend was increased to $27,000. They say that with the CIA's assistance in providing false identities, resumes, and references, Mr. Doe obtained professional employment in 1987. As Mr. Doe's salary increased, the amount of the stipend provided by the CIA commensurately decreased.

In 1989, Mr. Doe and the CIA allegedly agreed that once Mr. Doe's salary hit the $27,000 mark, his stipend would be suspended. However, Mr. Doe received the CIA's assurance that if his employment were termi-

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immigration or any other laws and regulations, or to the failure to comply with such laws and regulations pertaining to admissibility: Provided, That the number of aliens and members of their immediate families admitted to the United States under the authority of this section shall in no case exceed one hundred persons in any one fiscal year.

nated, his stipend would be resumed. The CIA assertedly assured Mr. Doe that the Agency would "always be there" for the Does.

As a result of a corporate merger in 1997, Mr. Doe lost his job. Although Mr. Doe made efforts to find new employment, he says that his advanced age and his security arrangement with the CIA, which required him to use the false identity and background that he had been provided, limited his options. The Does assert that they contacted the CIA to request assistance. The CIA refused to assist Mr. Doe in finding a new job as it had done in the past. Mr. Doe has remained unemployed. After several failed attempts to obtain CIA assistance, the Does sought legal representation.

In 1997, the Does were allegedly informed by a CIA representative that the Agency had determined that the benefits they had previously been provided had been adequate compensation for the services rendered and that further support would not be provided. The Does were then told that they could appeal this decision to the Director. The Does' counsel therefore prepared an appeal to the Director. While so doing, the Does' counsel repeatedly requested from the Agency internal regulations governing the appeals process as well as regulations regarding resettled aliens. The CIA never responded to these requests. Other requests for access to records or individuals within the CIA were also either denied or ignored by the CIA.

Nevertheless, the Does claim, they filed their administrative appeal with the Director in late 1997. It was subsequently denied. The Does assert that they then appealed to the Helms Panel, a panel consisting of former Agency officials. The Does allege that the

Helms Panel recommended that the Agency provide the plaintiffs "certain benefits . . . for a period not to exceed one year, and nothing thereafter." The payment was conditioned on the Does' signing waivers and release documents. Apparently, the Does declined to execute such documents and therefore did not receive the payments recommended by the Helms Panel.

The Does then filed suit in the United States District Court for the Western District of Washington. They asserted claims under the Equal Protection and Due Process Clauses of the United States Constitution, seeking declaratory, injunctive, and mandamus relief. Their complaint further requested that the district court require the CIA to resume payment of the benefits allegedly promised and provide constitutionally adequate internal review procedures.

The United States moved to dismiss the case for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The district court denied the CIA's jurisdictional motion under Rule 12(b)(1), finding that the rule announced by the Supreme Court in *Totten* did not prohibit the court from entertaining this suit. The district court determined that the trial could proceed despite the alleged existence of a secret agreement, and any materials involving national security interests ~~could~~ be adequately protected by submission under seal or by *in camera review*.

The district court also rejected the CIA's contention that the Tucker Act, 28 U.S.C. § 1346, requires that this case be heard in the United States Court of Federal Claims, because, according to the Agency, this was

essentially a contract suit seeking money damages from the United States. The district court reasoned that although the Does' request for injunctive relief may have included a directive that the CIA resume payments, the Does were not seeking solely a money damages judgment.

The district court went on to determine that the Does had properly stated both substantive and procedural due process claims, even apart from the existence of an alleged secret contract with the Agency. First, the district court found that "[the Does] may be able to base their entitlement to receipt of the CIA's monetary stipend on theories other than contract. For example, if plaintiffs are able to prove an entitlement to benefits based on a promissory or equitable estoppel theory, or if there is a regulatory or statutory basis for their entitlement, then they may be able to show a constitutionally protected property interest, regardless of *Totten*." Further, the court found that the Does had sufficiently stated due process claims on two separate theories—that the CIA had placed the Does in danger and that the CIA had created a special relationship with the Does.[2]

The United States later renewed its motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) and moved for summary judgment under Rule 56(c). The district court denied these motions and we granted an interlocutory appeal. See 28 U.S.C. § 1292(b). On appeal, the United States maintains that

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[2] The district court granted the CIA's motion to dismiss in part, holding that the Does had failed to allege facts demonstrating that the Agency had subjected them to unequal treatment in violation of the Fifth Amendment.

there is no jurisdiction over the case because any suit must be in the Court of Federal Claims, and because the rule in *Totten*, 92 U.S. at 107, requires dismissal of the Does' case. We disagree.

II

At the outset, we must address whether the Tucker Act, 28 U.S.C. § 1491(a)(1), precludes the district court from exercising jurisdiction in this case. That Act, in relevant part, grants the Court of Federal Claims exclusive jurisdiction over any claim against the United States in excess of $10,000 that is "founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1).[3]

The Does do not frame their complaint expressly to assert a contract claim. Indeed, they reserve the right to bring a contract action in the Court of Federal Claims at a later date. The label that is attached to a claim is not conclusive, however. Whether an action is founded upon a contract for purposes of the Tucker Act "depends both on the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought (or appropriate)." *Megapulse* v. *Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982); see also *North Star Alaska* v. *United States*, 14 F.3d 36, 37 (9th Cir. 1994) (adopting the *Megapulse* test).

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[3] The Tucker Act does not specify that the jurisdiction of the Court of Federal Claims over contract claims in excess of $10,000 is exclusive, but courts have referred to the Tucker Act's grant of exclusive jurisdiction as a shorthand way of recognizing that Congress has waived sovereign immunity for such claims only for actions brought in the Court of Federal Claims. See, e.g., *Transohio Sav. Bank* v. *Director, Office of Thrift Supervision*, 967 F.2d 598, 608-09 (D.C. Cir. 1992).

The Does' complaint may be read as seeking an injunction directing payment of $27,000 per year because that figure was agreed upon by the Does and the CIA. Such an award derived from the agreement of the parties, although phrased in terms of constitutional due process, would amount to specific performance of the contract that the Does allege that they had with the government—an agreement to "ensure financial and personal security for life." That type of claim falls within the exclusive jurisdiction of the Court of Federal Claims. See *North Star*, 14 F.3d at 37-38 (right to reformation of contract, even if phrased as statutory or constitutional right, is based on terms of contract and is therefore subject to the Tucker Act). The fact that the Court of Federal Claims has no power to grant specific enforcement of a contract does not mean that a suit for specific enforcement can be brought in district court. The Tucker Act is a limited waiver of sovereign immunity for contract actions; equitable contract remedies denied by the Court of Federal Claims are not within the waiver and may not be enforced against the United States at all. See *id.* at 38.

The primary claim of the Does, however, is for an injunction requiring the CIA to conduct internal hearings on their claims that comport with due process. The effect of the Tucker Act on this claim for relief depends upon the interest—life, liberty or property—that is asserted to trigger the requirement of procedural due process. One type of property interest might be argued to arise from the alleged contract between the CIA and the Does, which the Does allege guaranteed lifetime payments and protection. The District of Columbia Circuit has held that a due process claim that is triggered by a contractually-based property interest may be

brought in district court, on the theory that the right sought to be enforced arises from the due process clause and is not a suit on the contract itself. See *Transohio Sav. Bank* v. *Director, Office of Thrift Supervision*, 967 F.2d 598, 610-11 (D.C. Cir. 1992); *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523-24 (D.C. Cir. 1986). Our circuit has taken a stricter view, however, and has held that constitutional claims based on a contractual property interest fall within the Tucker Act and may not be brought in district court. See *Tucson Airport Auth.* v. *General Dynamics Corp.*, 136 F.3d 641, 647-48 (9th Cir. 1998) (rejecting *Transohio* rule); cf. *North Star*, 14 F.3d at 37-38. In this view, we are joined by the Second Circuit. See *Up State Fed. Credit Union* v. *Walker*, 198 F.3d 372, 377 (2d Cir. 1999) (holding that district court did not have jurisdiction over any claims that could not exist independently of a contract).[4]

[4] Our decisions in *Tucson Airport* and *North Star*, and the Second Circuit's decision in *Up State*, involved plaintiffs who sought by invoking a constitutional claim to secure rights guaranteed by the contract. Such actions are more directly contractual than those brought by the Does, who do not seek to enforce the contract in district court but merely to force the CIA to hold a hearing that meets the requirements of procedural due process. Our ruling in *Tucson Airport*, however, is broad enough to cover the present case:

> [B]ecause General Dynamic's constitutional claims are contractually-based, the district court lacks jurisdiction under the Tucker Act. All three constitutional claims are premised on the notion that the United States has some contractual obligation to General Dynamics under the Modification Center Contract that it has failed to satisfy. If the Modification Center Contract imposes no such obligation, the United States owes no duty to General Dynamics giving rise to an alleged constitutional violation. Because the United States's obligation is in the first instance dependent on the contract, these claims are contractually-based. *Tucson Airport*, 136 F.3d at 647. This rationale, by which we are bound, applies to any due process claim of the Does that is based on their contract with the CIA.

Indeed, one district court in New York has held that a constitutional claim seeking enforcement of a CIA contract similar to that alleged by the Does, and also seeking a declaration requiring a due process hearing, was subject to the Tucker Act and could not be brought in district court. See *Kielczynski* v. *United States CIA*, 128 F. Supp. 2d 151, 160 (E.D.N.Y. 2001), aff'd sub nom. *Kielczynski* v. *Does 1-2*, 56 Fed. Appx. 540, 2003 WL 187164 (2d Cir. 2003) (unpublished).

Perhaps because of this line of authority, the Does contend that their claim to a due process hearing is *not* based on their contract with the CIA. Several of the stated due process claims, however, are based in considerable part on the CIA contract, and the district court seems so to have interpreted it. These claims, for reasons we have just stated, may not be entertained by the district court. The Does, however, assert additional bases for their due process claims that do not suffer from the same jurisdictional defect.

The primary additional claim is based on an interest in liberty. The Does' claim that, regardless of the terms of their contract or whether a contract even existed, the CIA brought them into this country under conditions requiring a false identity and false history for their continuing safety. The Does allege and declare that, because of the false history and false references supplied by the CIA and the CIA's refusal to assist them further, no employment is available to them in the United States now that Mr. Doe's employment here was terminated. The failure of the CIA to provide the

means for their subsistence, according to the Does, leaves them no alternative but to return to eastern Europe, where they are in danger. The district court held that the Does had raised a triable issue of fact with regard to this claim based on a liberty interest. The district court also held that these same allegations and declarations presented a triable issue of a due process violation based on the duty of the government not to act affirmatively to place a person in a dangerous situation. See *Huffman* v. *County of Los Angeles*, 147 F.3d 1054, 1059 (9th Cir. 1998). Without indicating any view as to the ultimate merits of these claims, we find no error in the district court's ruling denying summary judgment and permitting these claims to go forward.[5] We also conclude that the district court is not precluded by the Tucker Act from entertaining these claims, because they are not founded upon, and do not depend on, any alleged contract between the CIA and the Does.

The Does also contend that their right to procedural due process arises from their status as persons in the PL-110 program. The government contends that the only relevant provision of that Act is 50 U.S.C. § 403h, which authorizes the Attorney General in the interest of national security to cause the admission of particular aliens as permanent residents regardless of their inadmissibility under other laws. See 50 U.S.C. § 403h. The government argues that this statute clearly creates no entitlement of the sort claimed by the Does. The

[5] We emphasize that this litigation is in a very early stage and full-fledged discovery has not yet begun. If, in further proceedings, the state of the evidence on this claim or any other claim that we permit to go forward becomes such that no rational trier of fact could find for the Does, nothing we say here prevents a renewed motion for summary judgment on the part of the CIA.

Does contend, however, that other regulations and practices of the CIA establish an entitlement to continued support for persons brought into the United States pursuant to the program.

It is difficult to evaluate this claim for purposes of the Tucker Act (or for summary judgment) because the internal regulations of the CIA that have been presented are redacted, and it is not clear that all regulations that might bear on the subject have been produced. The unredacted portions of the regulations in the record do not present sufficient foundation for the Does' claim to permit them to survive summary judgment, but we do not know what is in the unredacted portions or whether other undisclosed regulations might bear on the subject.[6] Because the government relied on its right to dismissal under *Totten* and the Tucker Act, the record is not fully developed. Discovery has been stayed by the district court pending this appeal. Although the Does have not yet made their case on their claim of PL-110 status, a grant of sum-

[6] The record contains a declaration from a CIA official that "I can inform the court unequivocally that there are *no* Agency or other federal regulations that require the CIA to provide lifetime subsistence assistance to individuals brought into the United States under the authority of PL-110. Neither PL-110, nor any other law, statute, regulation, internal policy, unstated principle or anything else has ever before, or does now, obligate the Agency to provide any form of lifetime financial assistance to individuals brought into the United States by CIA under the authority of PL-110."

The district court interpreted the first sentence above as a declaration that the official's search revealed no Agency or other federal regulations that require the CIA to provide lifetime subsistence. The court disregarded the legal conclusions set forth in the second sentence.

mary judgment against them would be premature at this point. We therefore affirm the district court's denial of summary judgment on the due process claim based on PL-110 status. Whether that claim may be successfully maintained in further proceedings in district court will depend in part on whether the government asserts a state secrets privilege, see Part III, *infra*, and what disposition follows from that assertion.

We emphasize, however, that a due process claim based on PL-110 status must not depend on the alleged contract, or any other contract, between the CIA and the Does. Such a contract-based due process claim is within the exclusive jurisdiction of the Court of Federal Claims under our decision in *Tucson Airport*. In denying the government's motion for summary judgment on the claim based on PL-110 status, the district court stated that the claim was based "not only on the regulations, but also on promises made to them and on the surrounding circumstances. A plaintiff's property right may exist if words, conduct, or circumstances indicate a mutually explicit understanding between the parties." The Tucker Act, however, grants exclusive jurisdiction to the Court of Federal Claims over actions "founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a). This grant encompasses claims based on "a mutually explicit understanding between the parties." If the Does are to pursue their due process claim based on PL-110 status in district court, they will have to establish a property right arising from such status that is not based on an express or implied contract.[7]

[7] The Does ultimately have the burden of showing entitlement. If a state secret privilege is asserted and the district court concludes that the evidence required to support the Does' claim is denied them because of the privilege, then the Does' claim will fail, as we explain below in discussing the *Totten* issue.

The Does also contend that CIA procedural regulations grant them a right to a fair hearing regarding their entitlement to benefits under the PL-110 program. Here again, the record may be incomplete because not all of the regulations are presented in full form. An agency is generally required to follow its own regulations. *Vitarelli* v. *Seaton*, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959). The government contends that the regulations impose no requirements on the CIA, and the unredacted portions of the regulations now in the record support the CIA's position. Here, too, it is too early in the litigation to enter a summary judgment against the Does because further proceedings, including discovery, may provide further support for their claim. If the Does' entitlement to a hearing under the regulations is based on their alleged contract with the CIA rather than a status conferred by regulation or other conditions independent of the contract, then under the principle of *Tucson Airport* the Tucker Act will preclude further proceedings on that claim in the district court as well.

The final claim presented by the Does is one of estoppel. The district court concluded that the Does had adequately pleaded the elements of estoppel: that the government actors knew the facts, that they intended that their conduct would be acted upon or acted in such a way that the Does had a right to believe they so intended, that the Does were ignorant of the true facts, and that they detrimentally relied on the conduct of the government actors. See *Lehman* v. *United States*, 154

F.3d 1010, 1016 (9th Cir. 1998). In addition, estoppel against the government requires a showing that the government actors "engaged in affirmative conduct going beyond mere negligence and that the public's interest will not suffer undue damage as a result" of the estoppel. *Id.* at 1016-17 (internal quotation marks and citation omitted). The district court held that the Does had raised a triable issue of fact concerning these last two requirements. On the basis of John Doe's declaration, the district court did not err in so ruling.

Under *Office of Personnel Management* v. *Richmond*, 496 U.S. 414, 426, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990), a litigant can use estoppel defensively but not offensively against the government. See *United States* v. *Hatcher*, 922 F.2d 1402, 1409 (9th Cir. 1991). *Richmond's* prohibition is against using estoppel offensively to obtain an award that would be contrary to a statute and would thus violate the Appropriations Clause of the Constitution. See *Richmond*, 496 U.S. at 424, 110 S. Ct. 2465. The Does, however, claim that payment of their subsistence is clearly authorized by statute and regulation and thus would violate no principle of *Richmond* or the Appropriations Clause. They also contend that their use of estoppel is similar to that authorized by this court in *Watkins* v. *United States Army*, 875 F.2d 699 (9th Cir. 1989) (en banc), where we held the government estopped from preventing the plaintiff's reenlistment in the Army. *Id.* at 711. We conclude that the Does have made a sufficient showing to forestall summary judgment. The district court accordingly did not err in denying summary judgment on the estoppel claim.

We also conclude that the estoppel claim does not fall within the confines of the Tucker Act, because it is not founded on an express or implied contract. See *Jablon* v. *United States*, 657 F.2d 1064, 1069-70 (9th Cir. 1981). Although *Jablon* also held that the United States had not waived its immunity from a promissory estoppel claim, *id.* at 1070 & n.9, our subsequent en banc decision in *Watkins* supports the use of estoppel to prevent the government from denying the benefit of PL-110 status if all of the elements can be proved. The district court did not err in concluding that it had jurisdiction to entertain the estoppel claim.

We therefore conclude that the Does are not barred by the Tucker Act from proceeding on their constitutional, statutory or regulatory claims or their estoppel claim in the district court, so long as those claims are not based on the alleged contract, or any contract, between the CIA and the Does. Those claims that we have identified as being based on contract are not within the jurisdiction of the district court and must be dismissed. The district court may proceed with the remaining claims. See *North Side Lumber Co.* v. *Block*, 753 F.2d 1482, 1486 (9th Cir. 1985) (holding that contractual claim must be dismissed under the Tucker Act, but other claims could go forward on remand).

III

Resolution of this case also requires us to decide whether *Totten* bars judicial review of this action.

One hundred twenty-five years ago, the Supreme Court dismissed a civil war spy's case for damages for breach of a contract with the government. See *Totten*, 92 U.S. 105, 23 L. Ed. 605. The Agency maintains that

as this case is also one by spies seeking recompense, *Totten* squarely governs this case. We do not agree.

Totten was indeed a landmark case, and one that retains its core vitality. But, as discussed at length below, *Totten* does not require immediate dismissal as to the Does' case because their claims—those that survive our Tucker Act analysis—do not arise out of an implied or express contract. Instead, the instant case is governed by the state secrets privilege, a separate aspect of the decision in *Totten* that has evolved into a well-articulated body of law addressing situations in which security interests preclude the revelation of factual matter in court.

Both the Supreme Court and our own court have specified the mode in which the government must invoke the state secrets privilege and the manner in which courts must apply it. And since *Totten*, the constitutional protection of the right to due process of law has developed into an assurance in most instances of *some* fair procedure, secret or open, judicial or administrative, before governmental deprivation of liberty or property becomes final. These two developments, taken together, preclude the summary dismissal of this case for which the Agency argues.

We acknowledge at the outset that it could very well turn out, after further district court proceedings, that the Does will still be left without redress even if everything they allege is true. When the government asserts that the interests of individuals otherwise subject to legal redress must give way to national security interests for the larger public good, the result can end in a balance tipped toward the greater good, with resulting unfairness to the individual litigants as the

acknowledged corollary. See *Bareford* v. *Gen. Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992); *Fitzgerald* v. *Penthouse Int'l Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985); *cf. Nixon* v. *Sirica*, 487 F.2d 700, 713 (D.C. Cir. 1973).

But precisely because the net result of refusing to adjudicate the Does' claims is to sacrifice their asserted constitutional interests to the security of the nation as a whole, both the government and the courts need to consider discretely, rather than by formula, whether this is a case in which there is simply no acceptable alternative to that sacrifice. The law regarding protection of national security interests in judicial proceedings provides guidance toward that end. State secrets privilege law prescribes that courts must be sure that claims of paramount national security interest are presented in the manner that has been devised best to assure their validity and must consider whether there are alternatives to outright dismissal that could provide whatever assurances of secrecy are necessary. That counterweight role has been reserved for the judiciary. We must fulfill it with precision and care, lest we encourage both executive overreaching and a corrosive appearance of inequitable treatment of those who have undertaken great risks to help our nation, an appearance that could itself have long-run national security implications.

A.

In *Totten*, the estate of William A. Lloyd, a spy hired by President Abraham Lincoln to gain information on Confederate troop positions during the Civil War, brought suit in the Court of Claims to recover compensation Lloyd had allegedly been promised under his

secret agreement with the President. The Supreme Court explained that the case was not justiciable because:

> The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained . . . whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award.

Id. at 106-07. In applying this reasoning to the claim of the Totten estate, the Court concluded that "[t]he publicity produced by an action would itself be a *breach of a contract* . . . and thus defeat a recovery." *Id.* at 107 (emphasis added).

The Agency and the dissent treat *Totten* as a jurisdictional bar to any case arising out of a relationship involving spy services. On this view, a court faced with any cause of action that traces back to allegations of an espionage relationship with the government must simply dismiss the complaint. We do not read *Totten* so broadly.

Read with care, *Totten* embodies two rulings. The first, often mistaken for a blanket prohibition on suits arising out of acts of espionage, is instead simply a holding concerning contract law: In *Totten*, the plaintiff, Lloyd, breached his contract with the President by revealing the contract's contents in his lawsuit. The Supreme Court held that because an implicit aspect of the contract was that the parties agreed to keep the very existence of the contract secret, "[t]he publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery." See *id.*; see also *Halpern* v. *United States*, 258 F.2d 36, 44 (2d Cir. 1958) (explaining that *Totten* "primarily turned on the breach of contract which the Court found occurred by the very bringing of the action"); Edward J. Imwinkelried, The New Wigmore: A Treatise on Evidence § 8.2 at 1146 (2002) ("[A] close reading of [*Totten*] indicates that the basis for the decision was the law of contracts rather than any privilege doctrine.") (citing Charles A. Wright & Kenneth W. Graham, Jr.,

Federal Practice and Procedure: Evidence § 5663, at 506 & n. 39 (1992)).

For two reasons, the contractual holding of *Totten* is not applicable here. First, as discussed in Part II, unlike Totten, the Does do not seek only enforcement of a contract. Rather their principal concern at this point, as they explain in their brief to this court, is "to compel fair process and application of substantive law to their claims within the Central Intelligence Agency's . . . internal administrative process." As the Agency is accustomed to conducting its affairs in secret, a fair internal process could presumably proceed in accordance with the secrecy implicit in an agreement to engage in espionage.

Second, *Totten* assumed "publicity" inconsistent with the implicit promise of secrecy as inherent in any judicial proceeding and did not consider whether there are means to conduct judicial proceedings without unacceptable attendant "publicity." Since *Totten*, courts, including the Supreme Court, have developed means of accommodating asserted national security interests in judicial proceedings while remaining mindful that there are circumstances in which no special procedures will be adequate to protect those interests. To the extent that the court can proceed without generating public exposure, it may be possible to fulfill any secrecy promise implicit in the agreement.

Here, the Does have so far proceeded in a manner that has not breached the agreement. They have done everything in their power not to reveal secret information: They filed suit under fictitious names and revealed only minimal, nonidentifying details in their complaint. Their attorneys for security reasons cleared

their complaint with CIA officials before filing it, and received security clearances from the CIA.

With court and government cooperation, it may be possible to continue the suit in a manner that avoids public exposure of any secret information.[8] Possible measures include using *in camera* proceedings, sealing records, and requiring security clearances for court personnel and attorneys with access to the court records. See, e.g., *Halpern*, 258 F.2d at 43 (describing the availability of an *in camera* trial as an option when the government invoked the state secrets privilege); *In re*

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[8] *In camera* court review is routinely considered consistent with assertions of the need for secrecy. *Cf. Loral Corp.* v. *McDonnell Douglas Corp.*, 558 F.2d 1130, 1132 (2d Cir. 1977) (invocation of state secrets privilege does not preclude court review of documents *in camera*). Review by the court *in camera* of a contract or other materials claimed to be secret is no different from *in camera* review of allegedly secret materials in a trade secrets case, or of evidence asserted to be subject to the attorney-client privilege. In such situations, a court's *in camera* inspection to determine whether a privilege applies is not itself a breach of the privilege. See, e.g., *United States* v. *Zolin*, 491 U.S. 554, 568-69, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989) (privileges survive *in camera* review); *In re Perrigo Co.*, 128 F.3d 430, 441 (6th Cir. 1997) (no waiver of attorney-client privilege by submitting documents to the court for *in camera* review); *Burlington N.R. Co.* v. *Omaha Pub. Power Dist.*, 888 F.2d 1228, 1232 (8th Cir. 1989) (contract alleged to be trade secret could be reviewed *in camera* without revealing trade secret); see also *Anderson* v. *Dep't of Health and Human Serv.*, 907 F.2d 936, 942 (10th Cir. 1990) (*in camera* review by court of documents to determine if material could be released to public under the Freedom of Information Act ("FOIA") does not equate with release to the public). Just as privileges are not waived and secrets not considered revealed in other contexts by *in camera* review, a court's review of documents *in camera* here would not breach any obligation the Does may have to keep the agreement secret.

United States, 872 F.2d 472, 478 (D.C. Cir. 1989) (describing options of *in camera* review, redaction, limited disclosure of documents, and a bench trial); *Fitzgerald* v. *Penthouse Int'l Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985) ("Once the state secrets privilege has been properly invoked, the district court must consider whether and how the case may proceed in light of the privilege. The court may fashion appropriate procedures to protect against disclosure."); *United States* v. *Musa*, 833 F. Supp. 752, 758-61 (E.D. Mo. 1993) (putting a protective order in place to control viewing of classified documents and requiring counsel to sign confidentiality agreement); see generally, Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 Yale L.J. 570, 586-88, n. 90 (1982); Veronica M. Fallon, Note, Keeping Secrets from the Jury: New Options for Safeguarding State Secrets, 47 Fordham L.Rev. 94, 109-13 (1978); *cf. Guerra* v. *Board of Trs.*, 567 F.2d 352, 355 (9th Cir. 1977) (describing methods court could use to protect confidentiality including *in camera* review, sealing of records, and deletion of names); Classified Information Procedures Act (CIPA), Pub. L. 96-456, 94 Stat. 2025 (Oct. 15, 1980), 18 U.S.C. app. III § 1 *et seq.* (providing procedures for use of privileged information as evidence in criminal trials); Neil A. Lewis, After Sept. 11, a Little Known Court has a Greater Role, N.Y. Times, May 3, 2002, at A20 (describing the Foreign Intelligence Surveillance Court and its procedures for approving wiretaps without jeopardizing national security or releasing state secrets).

Thus, *Totten's* holding with regard to enforcement of the secrecy aspect of contracts for spy services should not entirely preclude further proceedings in this suit.

And with some creativity in devising flexible procedures such as those suggested by courts that have grappled with these issues in the century and a quarter since *Totten*, it may prove possible to resolve the essential issues through court processes. That is not to say that such *in camera* review would always be justified or permissible, but only that it would not be precluded on a breach of contract theory.

B.

The other element of *Totten* is an early expression of the evidentiary state secrets privilege: "*[P]ublic policy* forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Totten*, 92 U.S. at 107 (emphasis added). This public policy principle has flowered into the state secrets doctrine of today. It is principally in this context that the Supreme Court has reaffirmed *Totten's* currency. See *United States* v. *Reynolds*, 345 U.S. 1, 7 n. 11, 73 S. Ct. 528, 97 L. Ed. 727 (1953) (citing *Totten* for support of the "well established" military secrets privilege); *Jencks* v. *United States*, 353 U.S. 657, 670 n. 16, 77 S. Ct. 1007, 1 L. Ed. 2d 1103 (1957) (citing *Reynolds* and *Totten* for general principle that government documents may be privileged on basis of national interest); *Rubin* v. *United States*, 525 U.S. 990, 992, 119 S. Ct. 461, 142 L. Ed. 2d 413 (1998) (Breyer, J., dissenting from denial of *cert.*) (citing *Totten* for state secrets privilege).

This court has so recognized. Our leading recent case construing *Totten* treats *Totten* as a state secrets case,

albeit one of a special variety. See *Kasza* v. *Browner*, 133 F.3d 1159, 1166-67 (9th Cir. 1998).

In *Kasza*, we noted that "[t]he state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military secrets," *id.* at 1165, and further noted that invoking the privilege requires certain formalities (discussed below in part III.C). We then stated that "*[o]nce the privilege is properly invoked and the court is satisfied as to the danger of divulging state secrets* . . . [t]he application of the state secrets privilege can . . . have three effects," one of which is "dismiss[ing] the plaintiff's action based solely on the invocation of the state secrets privilege." *Id.* at 1166 (emphasis added). For the latter point, *Kasza* cited, *inter alia*, *Totten*. *Kasza*, 133 F.3d at 1166.

Kasza then went on to apply its analysis to the facts of the case before it, investigating whether the privilege was "properly asserted and, even if properly asserted, [whether] the . . . invocation of the privilege was overbroad." *Id.* at 1168. Concluding that the government defendant had "satisfied the formal requirements necessary to invoke the privilege," *id.* at 1169, we determined that "*in camera* review of . . . classified declarations was an appropriate means to resolve the . . . scope of the state secrets privilege." *Id.* After conducting that *in camera* review, we decided, quoting *Totten*, that *Kasza*, like *Totten*, was a case in which " 'the trial . . . would inevitably lead to the disclosure of matters which the law itself regards as confidential,' "because "the very subject matter of Frost's action is a state secret." *Kasza*, 133 F.3d at 1170.

It is therefore the law of this circuit that *Totten* permits dismissal of cases in which it is asserted that the very subject matter is a state secret only *after* complying with the formalities and court investigation requirements that have developed since *Totten* within the framework of the state secrets doctrine.[9] This understanding of the role of *Totten* in the contemporary legal world comports with both *Totten* and later Supreme Court authority. *Totten* relied on other well-established privileges, such as the spousal privilege, attorney-client privilege, doctor-patient privilege, and clergy-penitent privilege, as a basis for its holding with regard to national secrets. See *Totten*, 92 U.S. at 107. Moreover, it is primarily in the context of the state

[9] Other circuits have similarly treated *Totten* as the progenitor of the state secrets doctrine, now subject to later-enunciated standards governing recognition of the privilege. *See Clift* v. *United States*, 597 F.2d 826, 828-30 (2d Cir. 1979) (holding that a case analogous to *Totten* should be analyzed under the state secrets privilege, and that the case could go forward even though revealing the underlying subject of the lawsuit, a secret patent, was barred by the privilege); *United States* v. *Ehrlichman*, 376 F. Supp. 29, 32 n.1 (D.D.C. 1974) (citing *Nixon* v. *Sirica*, 487 F.2d 700, 713 (D.C. Cir. 1973)) (describing the modification of Totten "by a century of legal experience, which teaches that the courts have broad authority to inquire into national security matters so long as proper safeguards are applied to avoid unwarranted disclosures"). The Federal Circuit appears to have conflicting authority on the application of *Totten*. Compare *McDonnell Douglas Corp.* v. *United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003) (citing to *Totten*, 92 U.S. at 107, for proposition that "when the 'very subject matter of the action' is a state or military secret, the action must give way to the proper invocation of the state secrets privilege." (emphasis added)) with *Guong* v. *United States*, 860 F.2d 1063, 1066 (Fed. Cir. 1988) ("A close reading of *Reynolds* reveals that it does not limit or modify the authority of *Totten*.").

secrets privilege that the Supreme Court in recent years has affirmatively cited to *Totten*.

The Agency relies on *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 102 S. Ct. 197, 70 L. Ed. 2d 298 (1981) for its contrary view of *Totten* as a free-floating, expansive doctrine of its own, divorced from the later development of the state secrets privilege. *Kasza*, however, was decided well after *Weinberger*, so *Kasza* is binding on us regarding the modern role of the *Totten* doctrine.

Further, *Weinberger* concerned in the main an explicit statutory exemption to the Freedom of Information Act ("FOIA"). *See Weinberger*, 454 U.S. at 144, 102 S. Ct. 197. FOIA analysis is governed strictly by statute, while the state secrets privilege is governed solely by judge-made law. Also, FOIA cases involve a determination of what information can be released *to the public* without any restriction on the information's dissemination. In contrast, the state secrets privilege governs what material can be used by individual litigants who need such information to make their cases, under such restrictions of access as may be necessary, including *in camera* review, closed proceedings, and sealed records. *Weinberger* therefore dealt principally with the substantive question whether the sensitive material at issue could be made public and only as a subsidiary matter with the handling of that material within the confines of litigation.

Weinberger did refer to *Totten* at the end of the opinion as an explanation, by analogy, concerning why the National Environmental Policy Act ("NEPA") inquiry could not go forward in court. It also referred, however, in the same context, to *Reynolds*, the seminal

state secrets privilege case. *Weinberger*, 454 U.S. at 147, 102 S. Ct. 197. The brief reference to *Totten* in *Weinberger* therefore cannot be read as prescribing the application of *Totten* without regard to the later-developed state secrets privilege doctrine, and *Kasza* evidently did not so read it.

We therefore conclude that *Totten* is applicable to the case before us only as applied through the prism of current state secrets doctrine.

C.

To invoke the state secrets privilege, a formal claim of privilege must be "lodged by the head of the department which has control over the matter, after actual personal consideration [of the evidence] by that officer." *Reynolds*, 345 U.S. at 7-8, 73 S. Ct. 528 (footnotes omitted); see also *Kasza*, 133 F.3d at 1165. After that, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *Reynolds*, 345 U.S. at 8, 73 S. Ct. 528; *see also Kasza*, 133 F.3d at 1165. The government has not thus far asserted the state secrets privilege in this case and has therefore not complied with the required procedures.[10]

This initial matter is one of formalities, true. But formalities often matter a great deal, and they certainly matter here. As *Kasza* noted, "dismissal of an action based on the state secrets privilege is harsh," but sometimes "the greater public good—ultimately the less harsh remedy—[is] dismissal." *Id.* at 1167 (internal

[10] On remand, the government should be given the opportunity before the case proceeds further to assert the state secrets privilege should it choose to do so.

citation and quotation marks omitted). Determining when we must ask individuals to bear the brunt of our national interest is a matter of profound moral importance. We therefore require that the government address the question in a manner commensurate with its gravity.

Additionally, there are practical reasons for insisting upon compliance with the formalities established by the state secrets privilege. There is always the possibility that subordinate officials have a motive to seek dismissal of an action based on state secrets considerations because they themselves, or someone under their supervision, would be exposed as having acted unfairly or illegally if the case went forward. Also, invocation of the state secrets privilege can have adverse as well as salutary effects on national security interests. If persons contracting with the government on matters involving the national security—spies, yes, but also suppliers of military and espionage-related goods and services—come to expect that promises cannot be enforced, their willingness to offer their services may in the long run dissipate.

For all these reasons, the state secrets privilege "is not to be lightly invoked." *Reynolds*, 345 U.S. at 7, 73 S. Ct. 528. If we are to inflict upon individuals otherwise protected by our laws, particularly the United States Constitution, the harsh remedy of dismissal to protect the rest of us, we must do so only after the individual responsible for the national security interest at stake personally reviews the matter, and only after he or she concludes and certifies that there is indeed a national security basis for refusing to allow any form of court consideration of the facts necessary to adjudicate

the dispute. It is invocation at that level of the executive hierarchy, and with that degree of personal assurance, that lessens the possibility of reflexive invocation of the doctrine as a routine way to avoid adverse judicial decisions. Invocation at that level of the executive hierarchy therefore underlies the "utmost deference" accorded state secrets claims. See *Kasza*, 133 F.3d at 1166.

The government has not complied here with the formalities essential to invocation of the state secrets privilege. That is reason enough to affirm the district court's refusal to dismiss this case.

D.

Given our holdings that the Tucker Act does not preclude the bringing of some of the Does' claims in the district court, and that *Totten* does not jurisdictionally preclude the lawsuit before us, we provide some guidance concerning the handling of the remaining claims should the state secrets privilege be invoked.

In *Reynolds*, the Court emphasized that judges must carefully review assertions of the state secrets privilege before approving the privilege. *See Reynolds*, 345 U.S. at 9-10, 73 S. Ct. 528; see also *Jencks*, 353 U.S. at 676, 77 S. Ct. 1007 (Burton, J., concurring). "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 9-10, 73 S. Ct. 528; *see also In re United States*, 872 F.2d at 475; *Ellsberg* v. *Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983); 8 Wigmore on Evidence § 2379 at 809-10 (McNaughton Rev. 1961) ("A court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish

bureaucratic officials too ample opportunities for abusing the [state secrets] privilege."); James Zagel, The State Secrets Privilege, 50 Minn L. Rev. 875, 900 (1966); Raoul Berger & Abe Krash, Government Immunity from Discovery, 59 Yale L.J. 1451, 1463 (1950).

More specifically, before approving the application of the privilege, the district court must be convinced by the Agency that there is a "reasonable danger" that military or national secrets will be revealed. *Reynolds*, 345 U.S. at 10-11, 73 S. Ct. 528. The state secrets privilege is an absolute privilege and cannot be overcome by a showing of necessity. Nonetheless, the greater the party's need for the evidence, the more deeply a court must probe to see whether state secrets are in fact at risk. *Reynolds*, 345 U.S. at 11, 73 S. Ct. 528; *Ellsberg*, 709 F.2d at 58-59.

As discussed at length previously, there are numerous safeguards courts can use to protect secret material from public exposure. The standard practice when evaluating claims that the state secrets privilege applies is to conduct *in camera* and *ex parte* review of documents. *See Kerr* v. *United States*, 426 U.S. 394, 405-06, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976) (citing *Nixon*, 418 U.S. at 706, 94 S. Ct. 3090 and *Reynolds*, 345 U.S. at 1, 73 S. Ct. 528); *Kasza*, 133 F.3d at 1166, 1169; *In re United States*, 872 F.2d at 475, 478-79; *Ellsberg*, 709 F.2d at 59.

In addition, unprivileged material can and must be separated from the privileged material. See *Kasza*, 133 F.3d at 1166 ("[W]henever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.") (quoting *Ellsberg*, 709 F.2d at 57); *In re United States*, 872 F.2d

at 475-76 ("The 'broad sweep' of the [state secrets] privilege, likewise requires that the privilege not be used to shield any material not strictly necessary to prevent injury to national security . . . .") (citing *Ellsberg*, 709 F.2d at 57). Finally, sealing of records and secret hearings are possible ways to adjudicate issues without public exposure of state secrets. *See, e.g.*, *Halpern*, 258 F.2d at 43; *In re United States*, 872 F.2d at 478. Where, as here, the government is seeking complete dismissal of the action for national security reasons, a court should consider these possibilities before determining that there is no way both to adjudicate the case and to protect state secrets.

Webster v. *Doe*, 486 U.S. 592, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988), confirms that particularly where constitutional claims are at issue, the *Reynolds* inquiry requires courts to make every effort to ascertain whether the claims in question can be adjudicated while protecting the national security interests asserted. In *Webster*, a discharged CIA covert employee, Doe, was allowed to go forward with his constitutional challenge to the CIA's denial of his security clearance. 486 U.S. at 604-05, 108 S. Ct. 2047. It is no accident that the case was called *Webster* v. *Doe*. In *Webster*, as here, the fact of the relationship with the CIA was secret. As the Court of Appeals in the case that became *Webster* explained, "John Doe [was] proceeding under a pseudonym only because his status as a CIA employee cannot be publicly acknowledged, not because of any embarrassment about his homosexuality." *Doe* v. *Casey*, 796 F.2d 1508, 1512 n.2 (D.C. Cir. 1986). So with regard to the secrecy of the relationship, the circumstances were the same as those present here.

Noting that a "serious constitutional question" would arise if consideration of Doe's constitutional claims were foreclosed, *Webster* permitted the constitutional causes of action to go forward despite the secrecy of the relationship. 486 U.S. at 603-05, 108 S. Ct. 2047 (citing *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986)). In so doing, the Court recognized that issues of national security could arise in the course of the litigation, necessitating special litigation procedures. Given the constitutional nature of the cause of action, however, the Court rejected the contention that the case should be dismissed out of hand. Instead, the Court instructed that "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission [,]" *citing, inter alia, Reynolds*. *Webster*, 486 U.S. at 604, 108 S. Ct. 2047.

Webster indicates that where constitutional issues are raised, the courts must consider the full panoply of alternative litigation methods outlined above—*in camera* review, sealed records, and, if necessary, secret proceedings—before concluding that the only alternative is to dismiss the case and thereby deny the plaintiff's claimed constitutional rights. The only obvious differences between *Webster* and this case for present purposes is that the Doe in the *Webster* case was a domestic employee while the Does in this case are foreigners who were engaged to spy for the United States abroad. Absent some reason nationality and location distinctions should matter, and the government

has suggested none, *Webster* requires that the constitutional nature of the Does' cause of action weigh heavily in applying the *Reynolds* state secrets privilege standard.

Applying that standard with the requisite care, we note first, once again, that the Does have alleged both property and liberty interests, including the endangerment of their lives, the interference with their ability to pursue employment, the failure to fulfill the obligations of the PL-110 program, and an estoppel theory. If true, these interests could constitute legitimate liberty and property rights for purposes of the Fifth Amendment. *See Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 573, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

Further, unlike the plaintiff in *Webster*, the Does primarily seek due process within the agency, not before the courts. The central constitutional issue in this case, the procedural due process cause of action, therefore is one that, unlike some of the constitutional causes of action alluded to in *Webster*, should not require factual development in court of the details underlying the dispute. Rather, to make out their procedural due process claim, the Does will need to demonstrate only that they had a relationship with the CIA that could potentially establish an entitlement to continued assistance or payments.

For several reasons, it is not self-evident that the Does, in order to establish such a relationship, will need to jeopardize state secrets:

First, the relationship may not truly be secret. It is widely known that the CIA contracts for spy services, and in particular that the CIA recruits foreign spies. It

is also public knowledge that many of these foreign recruits are provided permanent residency in the United States along with other compensation for their services. *See, e.g.*, Federal Government's Handling of Soviet and Communist Bloc Defectors: Hearing Before the Permanent Subcomm. on Governmental Affairs, U.S. Senate, 100th Cong., 100-02, 174-75 (1987) (describing support under Pub. L. No. 81-110 (1949) for defectors with information of great import to United States' interests); 50 U.S.C. § 403h (2002) (providing for the admission of aliens to this country when it is "in the interest of national security or essential to the furtherance of the national intelligence mission"). Furthermore, the complaint alleges that the CIA sent a letter to the Does admitting a relationship and stating that the Agency was unable to continue supporting the Does because of "budget constraints." *See* Letter from Nancy Clayborne (June 5, 1997). The existence of such a letter could be evidence that the Does' past relationship with the CIA is not now clandestine.

Second, it is possible that, if a claim of privilege is made, the district court might conclude that the Agency has not provided *any* basis for concluding that national security would be jeopardized by the revelation of the existence of a relationship with the Does. A substantial time has passed since the agreement with the Does was formed, and we are no longer "at war," "cold" or otherwise, with the Does' country of origin. When evaluating the invocation of the state secrets privilege, the district court must give the "utmost deference" to the government's evaluation of what constitutes a state secret that will jeopardize national security. *Kasza*, 133 F.3d at 1166. Such deference, however, does not entirely obviate the CIA's need to make a minimally

coherent explanation to the court concerning why simply admitting to a relationship with the Does could conceivably jeopardize national security.

Finally, because of the limited nature of a procedural due process inquiry, the specifics of the Does' relationship with the CIA—such as the place and manner in which they were recruited, their contacts, and the nature of the espionage—should not need to be revealed. Rather the evidentiary inquiry can be tailored to determine whether the alleged relationship with the CIA in fact existed and, if so, whether the resulting relationship gave rise to a legally cognizable property or liberty interest.

As to whether the CIA's procedures adequately protect any such interest, it is not clear that the agency will claim a secrecy interest in those internal procedures. If it does, the court may well be able to review the available procedure for consistency with constitutional standards in proceedings not open to the public.

It is worth emphasizing that the procedural due process cause of action seeks an alternative, *secret* way of adjudicating the merits of the Does' claims. Assuming the plaintiffs' allegations are true, as we must when evaluating a motion to dismiss, the outright dismissal of the Does' complaint would assuredly deny them their constitutional right to procedural due process, by foreclosing any review of the merits of their claim. Before depriving the Does of all due process, the possible availability of a truncated judicial inquiry, with the primary merits adjudication relegated to the agency, is an approach that merits careful scrutiny.

It is therefore possible that, after the most careful, respectful, and deferential inquiry, the district court could conclude that the Does' case may go forward in some manner, whether in open court or closed, without jeopardizing any state secrets. Accordingly, this case should be remanded to the district court for further proceedings consistent with the current law on the state secrets privilege, and with this opinion.[11]

The national interest normally requires both protection of state secrets and the protection of fundamental constitutional rights. Here, the CIA has not invoked

[11] Both the government and the dissent suggest that judges are not well suited to make evaluations of national security even of the most deferential sort. Once the government asserts the state secrets privilege, the dissent contends, a district court should go no further. That short-circuited approach is not the law, as *Kasza* makes clear. See *Kasza*, 133 F.3d at 1169-70; see also *McDonnell Douglas Corp.*, 323 F.3d at 1023 (affirming the trial court's dismissal of a claim under the state secrets privilege only *after* the trial court had reviewed the material supporting the invocation of the privilege). Although a district court must almost always defer to the government's evaluation of what constitutes a state secret and why, a district court cannot simply rubber stamp the government's conclusions.

The dissent mistakenly relies on *CIA* v. *Sims*, 471 U.S. 159, 105 S. Ct. 1881, 85 L. Ed. 2d 173 (1985) for its contrary proposition. *Sims* was a suit under FOIA in which a statutory exemption applied and allowed the government to withhold requested information. *Id.* at 168, 105 S. Ct. 1881. As discussed with regard to *Weinberger*, FOIA cases require a different calculus than cases involving invocation of the state secrets privilege, as the remedy sought is public disclosure. Furthermore, the *Sims* court did in fact conduct some, albeit minimal, review of the documents at issue. See *id.* at 165, 173, 105 S. Ct. 1881 (discussing with approval the district court's consideration of agency affidavits and evidence used to support the decision to withhold documents under FOIA).

the state secrets privilege nor has the district court had the opportunity independently to review the invocation of such a privilege. We should not precipitously close the courthouse doors to colorable claims of the denial of constitutional rights. The Does' case must therefore be remanded to the district court to provide the Agency the opportunity to formally invoke the state secrets privilege. If the Agency chooses to do so, the district court must then, after careful inquiry and consideration of alternative modes of adjudication, and with the utmost deference to the government's determination of national security interests, evaluate whether any aspect of the Does' case can go forward.

Costs on appeal are awarded to the appellees.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

TALLMAN, Circuit Judge, dissenting:

It is the prerogative of the Supreme Court, not ours, to decide whether *Totten* v. *United States*, 92 U.S. 105, 23 L. Ed. 605 (1875), continues to bar judicial review of actions arising from espionage services performed for the United States by secret agents, or whether the *Totten* doctrine has somehow been supplanted by the modern state secrets evidentiary privilege articulated in *United States* v. *Reynolds*, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953). My colleagues proclaim that *Totten* is "applicable to the case before us only as applied through the prism of current state secrets doctrine." Maj. Op. at 1151. But *Totten* holds that claims brought by secret agents against the government are non-justiciable. *Reynolds*, on the other hand, protects

against the unveiling of state secrets during the prosecution of an otherwise recognized cause of action. Far from modifying *Totten*, the Court's opinion in *Reynolds* reaffirms *Totten's* jurisdictional bar.

Furthermore, the majority fails to recognize the jurisdictional limitation imposed on the Does' lawsuit by the Tucker Act, which requires that this suit be brought in the Court of Federal Claims. Because the court's opinion is contrary to the clear rule announced in *Totten*, and ignores the limitations on our jurisdiction imposed by the Tucker Act, I respectfully dissent.

I

In *Totten*, the estate of William A. Lloyd, a spy hired by President Abraham Lincoln to gain information on Confederate troop positions during the Civil War, sought to recover in the Court of Claims compensation Lloyd had allegedly been promised under his secret agreement with the President. 92 U.S. at 105-06. The Supreme Court upheld the lower court's dismissal of the suit, concluding that the very nature of the contract foreclosed a suit for its enforcement. *Id.* at 107. In language directly applicable to the Does, the Court explained why such cases are not justiciable:

> The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement

> was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained . . . whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public.

Id. at 106-07.

The rule in *Totten* is not limited to breach of contract claims brought by those providing secret services to the government. Expanding its holding beyond the contract analysis, the *Totten* Court reasoned that "general principle[s] [of] public policy forbid[ ] the maintenance of *any* suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Id.* at 107 (emphasis added). Implicit in the Court's public policy holding is an understanding that fundamental principles of separation of powers prohibit judicial review of secret contracts entered into by the Executive Branch in its role as guardian of national security. See *id.* at 106 (discussing the President's powers as Commander in Chief); *see also Dept. of the Navy* v. *Egan*, 484 U.S. 518, 527, 108 S. Ct. 818, 98 L. Ed. 2d 918

(1988) (stating that the authority to protect national security information falls to the President as Commander-in-Chief of the armed services and head of the Executive Branch of government.).

There is a key distinction between spy cases like *Totten* and other classes of cases where Congress has provided an express remedy for relief. In the latter, the evidentiary privilege known as "state secrets" may properly be invoked to block otherwise relevant discovery in a recognized cause of action. An example is *United States* v. *Reynolds*. In *Reynolds*, the Supreme Court considered—in the context of a tort claim discovery dispute—the protection afforded to discovery of evidence that would reveal state secrets. *Id.* at 3, 73 S. Ct. 528 (noting that "an important question of the Government's privilege to resist discovery [was] involved").

Reynolds arose from the unfortunate crash of a military plane while it was testing secret electronic equipment. *Id.* at 2-3, 73 S. Ct. 528. The plaintiffs were three widows of civilian observers aboard the plane who died in the crash. *Id.* at 3, 73 S. Ct. 528. In an attempt to obtain discovery in support of their claim against the government under the Federal Tort Claims Act ("FTCA"),[1] the plaintiffs moved pursuant to Rule 34 of the Federal Rules of Civil Procedure for production of the Air Force accident investigation report and the statements of the three surviving crew members taken in connection with that investigation. *Id.* The government moved to quash, claiming that Air Force

[1] 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .").

regulations rendered the information privileged against disclosure. *Id.* at 3-4, 73 S. Ct. 528.

The district court rejected the government's claim, finding that the enactment of the FTCA waived the claimed privilege. *Id.* at 4, 73 S. Ct. 528. After the district court had already rendered its decision, it received a letter from the Secretary of the Air Force stating that the release of the information would "not be in the public interest." *Id.* The district court reheard the matter, after which the Secretary of the Air Force filed a formal claim of privilege asserting that the aircraft and its personnel were engaged in a secret mission at the time of the crash. *Id.* Because of the secret nature of the mission, the government refused to produce the requested documents. *Id.* at 5, 73 S. Ct. 528. The court, unable to determine whether the documents contained privileged matter, directed that the issue of negligence be decided in the plaintiffs' favor. *Id.* The government appealed and the court of appeals affirmed. *Id.*

On certiorari, the Supreme Court viewed *Reynolds* as presenting "an important question of the Government's privilege to *resist discovery*." *Id.* at 3, 73 S. Ct. 528 (emphasis added). The Court made clear that the "essential question" in *Reynolds* was whether the Government asserted a valid claim of privilege releasing it of its obligation to produce documents otherwise discoverable under Federal Rule of Civil Procedure 34. *Id.* at 6, 73 S. Ct. 528. The Court held that before the government can withhold relevant evidence under the state secrets privilege, it must first file a "formal claim of privilege, lodged by the head of the department

which has control over the matter"[2] and there must be a judicial determination that "the circumstances are appropriate for the claim." *Id.* at 7-8, 73 S. Ct. 528.

Contrary to the majority's reasoning, *Reynolds* did not alter the long-standing rule announced in *Totten* barring judicial review where the very subject matter of the suit is a state secret. The Supreme Court's opinion in *Reynolds* refers to *Totten* only twice. The most important reference occurs at footnote 26 where the Court expressly distinguished the *Totten*-type of case from the situation presented in *Reynolds*. There, the Court acknowledged that *Totten* is a different kind of case, one "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret." *Reynolds*, 345 U.S. at 11 n.26, 73 S. Ct. 528. For *Totten* cases, the Court observed that "[t]he action [is] dismissed *on the pleadings without ever reaching the question of evidence* . . . ." *Id.* (emphasis added).

The only other reference *Reynolds* makes to *Totten* is found at footnote 11. There, the Court cited *Totten* for the proposition that public policy supports the invocation of evidentiary privileges to exclude evidence in instances where the law regards matters to be confidential. *Id.* at 7 n.11, 73 S. Ct. 528. Footnote 11 does not suggest that the *Totten* doctrine has somehow evolved from a jurisdictional bar into an evidentiary rule of privilege, as the majority reasons. Rather, *Totten* expressly acknowledges that there is a higher

[2] The majority overlooks the fact that in this case, like *Totten*, the very subject matter of the suit is the state secret, and therefore *Reynolds* is not controlling authority and no formal invocation of the evidentiary privilege is necessary.

need to protect the disclosure of a contract for secret services with the government where the very existence of the arrangement is itself the secret not to be disclosed. *Totten*, 92 U.S. at 107.

While *Totten* and *Reynolds* are closely related in that both protect a state secret from disclosure, the rules announced in those cases differ in subtle but important respects. Most importantly, the state secrets privilege in *Reynolds* permits the government to withhold otherwise relevant discovery from a recognized cause of action (e.g., an FTCA case), while the *Totten* doctrine permits the dismissal of a lawsuit because it is non-justiciable before such evidentiary questions are ever reached.

Our holding in *Kasza* v. *Browner*, 133 F.3d 1159 (9th Cir. 1998), supports this conclusion. *Kasza* involved a recognized cause of action under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6972. The appeal was consolidated from two closely related cases, one against the Environmental Protection Agency, and the other against the Air Force, seeking to compel compliance with hazardous waste inventory, inspection, and disclosure responsibilities at a secret installation in Nevada. *Kasza*, 133 F.3d at 1162. During the discovery phase of the litigation, the Air Force refused to furnish almost all of the information sought by the plaintiffs, claiming it was privileged because enemies of the United States could determine what secret activities the Air Force was conducting if information associated with the operation was disclosed. *Id.* at 1163. The district court granted summary judgment in favor of the Air Force, finding that the formal invocation of the state secrets privilege

blocked the discovery requested and made trial impossible by effectively preventing the plaintiffs from establishing a *prima facie* case for any of their claims. *Id.* at 1162-63.[3] We affirmed. *Id.* at 1163.

In *Kasza*, we relied on the *Reynolds* rule that "the state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military secrets." *Id.* at 1165. After reviewing the applicable law, we reasoned that the application of the state secrets privilege can have different effects, depending on whether it is used to exclude evidence or to dismiss a cause of action. *Id.* at 1166. First, we found that the government's invocation of the privilege over particular evidence may completely remove the evidence from the case. *Id.* If a plaintiff cannot make out her *prima facie* case without the secret evidence, the court may dismiss her claim. *Id.* Second, the privilege may deprive a defendant of information that would otherwise give the defendant a valid defense to the claim. *Id.* In these cases, the court may grant summary judgment to the defendant. *Id.*

In the first two categories, before the state secrets privilege can be applied in an otherwise justiciable case, there must be a formal claim of privilege followed by judicial review to determine whether the circumstances are appropriate for its invocation. *Id.* at 1165-66. After the court has decided what evidence is unavailable as a result of the application of the privilege, the court must determine whether the plaintiff is still able to establish a *prima facie* case or whether the defendant can prove up a defense in light of the court's exclusionary ruling.

[3] The district court dismissed the second case as moot. *See Kasza*, 133 F.3d at 1163.

Id. at 1166. In *Kasza*, we found that the plaintiffs' RCRA claims could not be proven without the documents withheld as privileged, and therefore summary judgment was appropriate. *Id.* at 1170 ("[T]he state secrets privilege bar[s] [the plaintiffs] from establishing [a] *prima facie* case . . . .").

Finally, we addressed the third category of cases where the "very subject matter of the action" is a state secret. *Id.* at 1166. We found that in these cases there is no need to evaluate a plaintiff's ability to produce nonprivileged evidence. Instead, "the court should dismiss [a] plaintiff's action based solely on the invocation of the state secrets privilege." *Id.*

The third category recognized in *Kasza* is controlled by *Totten*. In defining this category of cases, we cited *Reynolds's* footnote 26, where, as discussed above, the Supreme Court expressly distinguished the *Totten*-type cases from other cases involving the state secrets privilege. *Kasza*, 133 F.3d at 1166. We also cited *Totten's* broader public policy holding. *Id.* We recognized that this category includes those cases where the subject matter of the suit is itself a state secret requiring dismissal. *Id.* In these cases, as soon as it becomes obvious to the court that the action is simply not justiciable, the case is dismissed. Dismissal can occur even before the court resolves evidentiary issues or discovery disputes implicating the plaintiff's ability to establish a *prima facie* case. *Reynolds*, 345 U.S. at 11 n.26, 73 S. Ct. 528; *Kasza*, 133 F.3d at 1166 (citing *Totten*, 92 U.S. at 107); *see also In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989) (noting with approval the district court's order distinguishing cases where the subject matter of the litigation is a state secret from

those where the discovery requested is the state secret).

We concluded that the plaintiffs' discovery in *Kasza* was not only barred by the state secrets privilege, which prevented them from establishing their *prima facie* case justifying dismissal, but also that the plaintiffs' claims fell into the third category of cases represented by *Totten* because the Air Force could neither "confirm or disprove that any hazardous waste had been generated, stored, or disposed of at the operating location." *Kasza*, 133 F.3d at 1163, 1170.

The majority stretches the court's holding in *Kasza* beyond its logical bounds to find that "[i]t is therefore the law of this circuit that *Totten* permits dismissal of cases in which it is asserted that the very subject is a state secret only *after* complying with the formalities and court investigation requirements that have developed since *Totten* within the framework of the state secrets doctrine." Maj. Op. at 1150 (emphasis in original).

Kasza neither announced nor applied such a rule. While the *Kasza* court chose to rule on the *Totten* issue after it ruled on the state secrets privilege, nothing in *Kasza* suggests that judicial review of *Totten*-type claims is mandated. Instead, the *Kasza* court specifically identified the *Totten*-type of cases as a separate type of case where dismissal may be appropriate on the pleadings. *Kasza* makes clear that in the third category of cases "the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege" without the judicial balancing required in the discovery-type cases. *Kasza*, 133 F.3d at 1166. *Kasza's* reliance on *Reynolds's* footnote 26 for support further

compels the conclusion that no judicial determination need be made before applying the jurisdictional bar announced in *Totten*. *Kasza*, 133 F.3d at 1166.

After a careful review of Supreme Court case law, as well as our own holding in *Kasza*, I conclude the state secrets privilege announced in *Reynolds* does not limit or modify *Totten* or its bar on judicial review of cases where the subject matter of the lawsuit is a state secret. Rather, *Totten* continues to permit a court to determine that the subject matter of a suit is beyond judicial scrutiny and may properly be dismissed at the pleading stage. *See Reynolds*, 345 U.S. at 11 n.26, 73 S. Ct. 528; *Kasza*, 133 F.3d at 1166. Other courts have come to the same conclusion. *See Guong* v. *United States*, 860 F.2d 1063, 1066 (Fed. Cir. 1988) ("A close reading of *Reynolds* reveals that it does not limit or modify the authority of *Totten* or its rationale."). While the Supreme Court certainly could have supplanted *Totten* with *Reynolds*, it did not, and the majority should not do so in this case.

II

The majority opinion also errs in limiting the application of *Totten* to contract claims. While such a limitation is necessary to reach the result the majority is determined to announce in this case, the holding in *Totten* belies such a confined application. Rather, the rule announced in *Totten* extends to claims for tort or constitutional violations arising from the secret contractual relationship.

The district court acknowledged that proof of the existence of a contract for secret services between the Does and the CIA was a fact under *Totten* that would

have precluded the continuation of this litigation. In an attempt to narrow the application of the *Totten* bar, however, the district court declared that "[r]egardless of whether a secret contract does exist, there are substantial issues and claims remaining in this case that lie outside the reach of *Totten*." *Doe* v. *Tenet*, 99 F. Supp. 2d 1284, 1289 (W.D. Wash. 2000). The district court reasoned that

> [the Does] may be able to base their entitlement to receipt of the CIA's monetary stipend on theories other than contract. For example, if plaintiffs are able to prove that they had an entitlement to benefits based on a promissory or equitable estoppel theory, or if there is a regulatory or statutory basis for their entitlement, then they may be able to show a constitutionally protected property interest, regardless of *Totten*.

Id. at 1291 (footnote omitted).

The district court's limitation of *Totten* to contracts for secret services finds no support in *Totten* or its progeny. See, e.g., *Weinberger* v. *Catholic Action of Hawaii/Peace Ed. Project*, 454 U.S. 139, 146-47, 102 S. Ct. 197, 70 L. Ed. 2d 298 (1981) (applying *Totten* to a National Environmental Policy Act claim); *Guong*, 860 F.2d at 1065 (applying *Totten* to bar claim for failure to rescue); *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1241-42, 1244 (4th Cir. 1985) (citing *Totten* in support of dismissal of libel action); *Kielczynski* v. *CIA*, 128 F. Supp. 2d 151, 162-63 (E.D.N.Y. 2001) (rejecting argument that constitutional claims arising from contract for secret services fall outside of *Totten* doctrine), *aff'd sub nom. Kielczynski* v. *Does 1-2*, No. 01-6103, 2003 WL 187164 (2d Cir. Jan. 23, 2003) (unpublished

disposition). *Totten* itself did not limit its holding to those cases involving contracts for secret services. Instead, the Court held that "public policy forbids the maintenance of *any* suit in a court of justice, the trial of which would inevitably lead to the disclosure of *matters* which the law itself regards as confidential." 92 U.S. at 107 (emphasis added). The Court did not limit its holding to those circumstances where a secret *contract* must be revealed. Rather, the Court held, much more generally, that the maintenance of a suit is forbidden where *any matter* which the law regards as confidential would have to be disclosed. *Id.*

The breadth of the *Totten* doctrine is demonstrated in its application in *Weinberger* v. *Catholic Action of Hawaii/Peace Ed. Project*, 454 U.S. at 146-47, 102 S. Ct. 197. In *Weinberger*, the Supreme Court reversed our holding that the Navy could be required to prepare and release a "hypothetical" environmental impact statement with regard to the operation of one of its Hawaiian magazines capable of storing nuclear weapons. *Id.* at 140, 147, 102 S. Ct. 197. The Supreme Court observed that because the locations of nuclear weapons storage facilities were classified for national security reasons, "the Navy [could] neither admit nor deny that it propose[d] to store nuclear weapons at [the Hawaiian facility]." *Id.* at 146, 102 S. Ct. 197.

In holding that the Navy was therefore not required to prepare a "hypothetical" environmental impact statement, since it would necessarily result in the disclosure of classified information, the Court concluded that the degree of the Navy's compliance with the relevant environmental statutes was a matter "beyond judicial scrutiny." *Id.* Citing *Totten*, the Court concluded that

the maintenance of this suit was forbidden since the case involved a matter which the law itself regards as confidential. *Weinberger*, 454 U.S. at 146-47, 102 S. Ct. 197.

These cases illustrate that the *Totten* doctrine applies to the facts of this case regardless of whether the Does' claim is based on a secret contract with the CIA or on other theories of relief that necessarily involve the disclosure of that secret relationship. Clever pleading cannot evade a clear prohibition.

As with a claim sounding strictly in contract, a claim based on theories of estoppel would require the Does to actually demonstrate a relationship with the CIA. It would require that the Does prove, for instance, a binding representation made by the CIA to the Does on which they relied to their detriment. But the very existence of such a relationship or implied contract for secret services between the Does and the CIA is a secret that cannot be disclosed, since disclosure of this fact would inevitably "compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent." *Totten*, 92 U.S. at 106.

Any attempt to demonstrate a regulatory or statutory basis for an entitlement to benefits from the CIA must fail for the same reason. Even assuming that the Does could demonstrate that either the statutory language of Section 403h, the statute from which the term "PL-110" is derived, or the regulations regarding the support provided to former PL-110 resettlees, actually mandate the relief requested, they would still have to prove that they were indeed individuals classified as

PL-110s.[4] That is, the Does would have to show that a relationship or an agreement existed between themselves and the CIA that would entitle them to seek relief under these specific statutes and regulations for the benefits they now claim.

The district court also found that the Does "have sufficiently stated a claim that the government violated their substantive due process rights by creating a special relationship with plaintiffs and then failing to provide for their basic needs and protect them from deprivations of liberty, or by affirmatively placing them in danger." *Doe* v. *Tenet*, 99 F. Supp. 2d at 1293. The Does could, as a general matter, assert a violation of their due process rights if (1) the CIA created a special relationship with them and thereafter abused that special relationship, or (2) if the CIA affirmatively placed the Does in danger. See *L.W.* v. *Grubbs*, 974 F.2d 119,

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[4] In any event, it is unlikely that the Does would be able to demonstrate that either Section 403h or the regulations regarding so-called PL-110s mandate such relief. Section 403h simply provides that in his discretion, the Director of Central Intelligence ("DCI") may admit aliens into the United States for permanent residence "without regard to their inadmissibility under the immigration or any other laws and regulations." 50 U.S.C. § 403h. Nothing in the language of the statute itself even alludes to the provision of support, financial or otherwise, by the CIA or any other governmental agency. Further, the regulations provided to us demonstrate that although the CIA may have granted some benefits and support to others alleged to have been PL-110s, none of those regulations mandate the provision of such support. In fact, the regulations clearly indicate that the amount and extent of support provided is wholly within the discretion of the DCI and may be terminated at any time. To illustrate, a redacted 1990 internal CIA Regulation noted that the Agency's support "normally terminates when [an alien] acquires citizenship in our Country, but may be terminated earlier."

121 (9th Cir. 1992). To succeed on their substantive due process claim, the Does would have to establish either that a relationship with the CIA in fact existed or that the CIA affirmatively placed them in danger. This they cannot do, for "the employment and the service were to be equally concealed." *Totten*, 92 U.S. at 106.

III

Totten bars judicial review of cases arising out of secret contracts for espionage services even where the plaintiff alleges national security is no longer at risk because there has been public acknowledgment of the contract. Unlike the majority, I have no difficulty rejecting the plaintiffs' invitation to second-guess the DCI's determination of what information remains harmful to national security or otherwise embarrassing to the federal government.[5]

The highest judicial deference is owed to the DCI's determination that disclosure of the relationship between the Does and the CIA would pose a threat to national security. *See* 50 U.S.C. § 403-3 (providing that as part of its responsibilities, the DCI shall "protect intelligence sources and methods from unauthorized

[5] I reject the majority's view that judicial review of secret contracts for espionage services may actually enhance national security. According to the majority, if suppliers of military and espionage-related goods and services come to expect that promises cannot be enforced, their willingness to offer their services may in the long run dissipate. Maj. Op. at 1152. But such a policy determination is not ours to make. Rather, that decision is entrusted to the Executive Branch. The better rule is to dismiss such cases at the outset of the litigation without forcing an acknowledgment by the government and before any of the forbidden details can inadvertently come to light.

disclosure"). As the Supreme Court has declared, "Congress intended to give the Director of Central Intelligence broad power to protect the secrecy and integrity of the intelligence process. The reasons are too obvious to call for enlarged discussion; without such protections the Agency would be virtually impotent." *CIA* v. *Sims*, 471 U.S. 159, 170, 105 S. Ct. 1881, 85 L. Ed. 2d 173 (1985).

In *Sims*, the Supreme Court aptly observed that judges are ill-suited to evaluate these secrecy considerations:

> We seriously doubt whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only after examining the facts of the case to determine whether the Agency actually needed to promise confidentiality in order to obtain the information. . . . Moreover, a court's decision whether an intelligence source will be harmed if his identity is revealed will often require complex political, historical, and psychological judgments.
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> * * *

And it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process. *Id.* at 176, 180, 105 S. Ct. 1881.

The Does nevertheless assure the court that litigation of this case would not involve disclosure of any matter that would pose a threat to the nation's security interests, particularly where the espionage activities at issue occurred so long ago.

We should reject the Does' invitation to circumvent *Totten*, a case that itself was not decided until ten years after the end of the Civil War and, presumably, until after the need for secrecy had subsided. Instead, we would be well advised to adopt the rule set forth by the Federal Circuit in *Guong*, holding that "it cannot be doubted that *Totten* stands for the proposition that no action can be brought to enforce an alleged contract with the government when, *at the time of its creation*, the contract was secret or covert." *Guong*, 860 F.2d at 1065 (emphasis added). The Does' argument must fail because, as the Federal Circuit recognized, "what may seem historical trivia to [the plaintiff] may be of great moment to the government, which has a much broader view of the world scene." *Id.* at 1066.

Nor do I find persuasive the plaintiffs' argument that the existence of ambiguous correspondence allegedly exchanged between the parties transform their secret arrangement into a public one. *See id.*; *see also* *Mackowski* v. *United States*, 228 Ct. Cl. 717, 719 (1981) (rejecting the same argument and finding that speculation is not equivalent to public disclosure). To protect this country's legitimate interest in maintaining its national security, the existence of the alleged relationship between the Does and the United States is itself a

fact not to be disclosed, and without this fact the case may not proceed.[6]

IV

Also unpersuasive is the majority's reliance on modern judicial proceedings designed to protect confidential information from disclosure during the course of litigation, such as *in camera* proceedings, to save the Does' claims from dismissal. The district court quoted *Webster* v. *Doe*, 486 U.S. 592, 604, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988), to support its assertion that district courts have "latitude to control any discovery process which may be instituted so as to balance [plaintiffs'] need for access to proof which would support a colorable constitutional claim against the extraordinary

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[6] A broader reading of *Totten* is consistent with the Supreme Court's recognition of the public policy interest in, and the critical need for, secrecy in the intelligence field. Reviewing the congressional hearing testimony of Allen Dulles, the CIA's third DCI, and of Air Force General Vandenberg in support of the National Security Act of 1947, the Court in *Sims*, 471 U.S. at 171-172, 172 n.16 (1985), quoted none other than George Washington on the need for complete secrecy in this sensitive area of government operations:

> Secrecy is inherently a key to successful intelligence operations. In the course of issuing orders for an intelligence mission, George Washington wrote to his agent:
>
> "The necessity of procuring good intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it they are generally defeated . . . ." 8 Writings of George Washington 478-479 (J. Fitzpatrick ed. 1933) (letter from George Washington to Colonel Elias Dayton, July 26, 1777).

needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Doe* v. *Tenet*, 99 F. Supp. 2d at 1290 (quoting *Webster*, 486 U.S. at 604, 108 S. Ct. 2047). The district court noted that the CIA could also "request leave to submit materials in this matter under seal or *in camera*, or may assert the state secrets privilege recognized in [*Reynolds*]." *Id.* The district court and the majority's reliance on *Webster* and *Reynolds* is misplaced.

In *Webster* a discharged CIA employee filed a claim against the CIA alleging that he was fired because of his homosexuality. 486 U.S. at 595-96, 108 S. Ct. 2047. In an opinion where the majority never cited *Totten*, the Supreme Court held that, although the Director's discretionary decision to discharge an employee for national security reasons was not subject to judicial review under the Administrative Procedure Act, *id.* at 601, 108 S. Ct. 2047, the discharged employee's constitutional claims were judicially reviewable. *Id.* at 603-04, 108 S. Ct. 2047. The *Webster* Court reasoned that in enacting the relevant statute, Congress did not mean to impose restrictions denying courts the authority to resolve constitutional claims arising from the DCI's termination decisions. *Id.* at 604, 108 S. Ct. 2047. The *Webster* Court recognized that "claims attacking the hiring and promotion policies of the [CIA] are routinely entertained in federal court. . . ." *Id.* The Court also reasoned that the employee's claims stemmed from the existence of the employment relationship and the information sought involved the "same sort of rummaging" found in employment cases. *Id.* In those circumstances, the Court concluded, the district court had the latitude to balance the plaintiff's need for access to

proof with the government's need for confidentiality. *Id.*

Unlike the case at hand, *Webster* did not involve disclosure of the type of secret agreement that would preclude litigation under *Totten*. There is a difference between the domestic employment of Agency workers and foreign spies. It is no secret that federal employees work for the CIA in a variety of sensitive positions. Terminating one for an alleged impermissible reason is the grist of many labor and employment lawsuits. To the contrary, the Does cannot even establish the existence of their secret employment without running afoul of *Totten*. The "sort of rummaging" permissible in *Webster* is intolerable in cases controlled by *Totten*. *Weinberger*, 454 U.S. at 147, 102 S. Ct. 197 (citing *Totten*, 92 U.S. at 107).

The district court's reliance on *Reynolds* as authority to conduct *in camera* proceedings after forcing the government to answer the Complaint, thereby revealing the secret fact of employment, is likewise misplaced. The *Reynolds* Court held that when this is the case we should not jeopardize national security by "insisting upon an examination of the evidence, *even by the judge alone, in chambers*." *Reynolds*, 345 U.S. at 10, 73 S. Ct. 528 (emphasis added). *Reynolds* recognized that in those situations described by *Totten* as "inevitably lead[ing] to the disclosure of matters which the law itself regards as confidential," *Totten*, 92 U.S. at 107, no amount of judicial oversight is sufficient to protect the national security interests at stake.

V

Although I do not think it is necessary to the resolution of this case, I note that even if the Does' claims could somehow overcome the *Totten* bar (which they cannot), the Tucker Act, 28 U.S.C. § 1491(a)(1), requires the Does to bring this case in the Court of Federal Claims.

The Tucker Act grants exclusive jurisdiction to the Court of Federal Claims for suits against the United States whenever an action seeks money damages or arises from an express or implied contract. 28 U.S.C. § 1491(a)(1); *Demontiney* v. *United States ex rel. Dept. of Interior*, 255 F.3d 801, 810 (9th Cir. 2001).[7] This jurisdictional limitation extends to constitutional claims against the United States that are dependent on rights provided under a government contract. *Tucson Airport Auth.* v. *Gen. Dynamics Corp.*, 136 F.3d 641, 647 (9th Cir. 1998) (holding when constitutional claims are premised on the notion that the United States has some contractual obligation to the plaintiff that it has failed to satisfy, the claims are contractually based and must be heard in the Court of Federal Claims); *North Star Alaska v. United States*, 14 F.3d 36, 37 (9th Cir. 1994) (holding if a plaintiff's claim is concerned with rights

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[7] The Tucker Act grants jurisdiction to the Court of Federal Claims:

> to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1).

created within the contractual relationship, it falls within the Tucker Act).

The majority seeks to avoid this second jurisdictional obstacle by cleverly dissecting the Does' claims and recasting some of them as independent of the underlying contract. For example, the majority finds that the Does may have a liberty or due process claim outside of the Tucker Act because they allege that the CIA placed them in danger by bringing them to this country, providing them with false identities, and then failing to take care of them when Mr. Doe lost his job. The Does' "intentional endangerment" claim, however, is nothing more than a claim that the United States failed to provide for the Does as required by the parties' alleged agreement.

In the absence of an agreement with the government, the Does would have neither a false history nor an expectation of governmental aid. If the government owed the Does any duty at all, the source of that duty must be the alleged contract. *Tucson Airport Auth.*, 136 F.3d at 647 (finding claim contractually based where "[the] duty, if it exists, derives from the contract"); see also *Up State Federal Credit Union* v. *Walker*, 198 F.3d 372, 377 (2d Cir. 1999) (finding that the parties' dispute was contractual in nature and subject to the Tucker Act because, had the parties not entered into the contract, the plaintiff would have no claim against the government); *Kielczynski*, 128 F. Supp. 2d at 160 (rejecting a former covert employee's argument that the source of his rights was the due process clause and finding instead that his cause of action was ultimately based on his contract with the CIA).

Likewise, the Does' due process claim—declaring that the Does seek only to compel "a constitutionally adequate hearing in which to adjudicate their rights" —is based on the their alleged secret contract with the CIA. In *Kielczynski*, a factually indistinguishable case, a district court rejected the same due process argument the Does raise here. 128 F. Supp. 2d at 160- 61. There, the plaintiff, who had been a former spy for the CIA, argued that the CIA's failure to conduct an adequate hearing in order to determine whether he was entitled to additional benefits violated the due process clause. *Id.* at 160. In that case, the court had no problem holding that the Tucker Act precluded it from exercising jurisdiction over the plaintiff's claim because "the very existence of the alleged due process claim hinge[d] on the existence of[the] contract."[8] *Id.* at 161, *aff'd sub nom. Kielczynski* v. *Does 1-2*, 2003 WL 187164 (2d Cir. Jan. 23, 2003) (unpublished disposition).

The Does' claim that CIA regulations and procedures entitle them to continued support as persons brought into the United States pursuant to the PL-110 program is also contractually based. The Tucker Act's jurisdictional grant includes claims upon any implied contract with the United States. The Does' PL-110 status claim is nothing more than an assertion that abstract CIA procedures, combined with the Does' status as participants in the PL-110 program, create an implied contractual obligation to pay them additional monetary support.

Finally, the Does' estoppel claim is contractually based because it depends on their ability to prove that

[8] The *Kielczynski* court specifically rejected the reasoning of the district court in this case. *Id.* at 161.

the CIA entered into an agreement upon which it intended, or the Does rightfully believed that it intended, the Does to rely. See *Watkins* v. *United States Army*, 875 F.2d 699, 710 (9th Cir. 1989). The Does' estoppel claim ultimately rests on their allegation that they entered into an agreement with the CIA, the Does satisfactorily performed their end of the bargain, and the CIA thereafter failed to perform as promised. Under our case law, the Does' estoppel claim is contractually based and must be heard in the Court of Federal Claims. *Tucson Airport Auth.*, 136 F.3d at 647-48; *North Star Alaska*, 14 F.3d at 37.

We lack the power to exercise subject matter jurisdiction when Congress has given it to another court. The Does should not be permitted to evade the valid jurisdictional limitations of the Tucker Act by labeling their action as something other than what it truly is: a breach of contract claim.

VI

There has been no change in the law of spy contracts since *Totten* was decided in 1875. The secret existence of the espionage relationship and a claim for greater compensation was not justiciable then; it is not justiciable now. Once it is clear that the plaintiff's action is controlled by *Totten*, no further proceedings are required and we must dismiss the case. The law for this class of cases has remained constant for 128 years.

We cannot avoid our obligation to follow *Totten* by suggesting that somehow the law has evolved to a point where the unequivocal rule announced therein is no longer necessary. *Totten* has not been supplanted by procedural rules enacted by Congress in order to

protect confidentiality during the discovery phase of litigation under congressionally created causes of action. Unless the Supreme Court revisits *Totten* or Congress provides a new statutory remedy to further compensate former spies, we are required to abide by the Court's holding that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential. . . ." 92 U.S. at 107; see, e.g., *Landrigan* v. *Stewart*, 272 F.3d 1221, 1229 (9th Cir. 2001) ("[W]e must leave it to the [Supreme] Court to overrule its own cases, if and when it decides to do so."); *Hart* v. *Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("Binding authority must be followed unless and until overruled by a body competent to do so.").

Proof of the existence of a contract for secret services or of a secret espionage relationship with the CIA is "itself a fact not be disclosed." *Totten*, 92 U.S. at 107. Because "[t]he secrecy which such contracts impose precludes any action for their enforcement," *id.*, the Does' lawsuit is not justiciable under *Totten*. Even if the Does' suit could be heard in federal court, the Tucker Act mandates that it be filed in the Court of Federal Claims. Because the court's opinion fails to adhere to the jurisdictional limitations announced by the Supreme Court and enacted by Congress, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35419

JOHN DOE AND JANE DOE, PLAINTIFFS-APPELLEES

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

[Jan. 7, 2004]

ORDER

Before: CANBY, BERZON and TALLMAN, Circuit Judges.

Dissent by Judge KLEINFELD.

The majority of the panel has voted to deny appellee's petition for rehearing and petition for rehearing en banc. Judge Canby votes to deny the petition for rehearing and recommends denial of the petition for rehearing en banc. Judge Berzon votes to deny the petition for rehearing and the petition for rehearing en banc. Judge Tallman votes to grant the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. An active judge requested a vote on whether this matter should be reheard before an en banc panel. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc reconsideration. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

KLEINFELD, Circuit Judge, with whom Circuit Judges KOZINSKI, O'SCANNLAIN, TALLMAN, BYBEE and CALLAHAN join, dissenting from denial of rehearing en banc:

I respectfully dissent from the order denying rehearing en banc.

"Doe" is a pseudonym, because Mr. and Mrs. Doe were apparently spies for the United States in the Soviet empire. Of course, all we know is what the Does now allege. The facts are unconfirmed. The case comes up on an interlocutory appeal of a district court order denying the CIA's motion to dismiss.

Mr. Doe was a diplomat for one of the "republics." He sought to defect to the United States. He and Mrs. Doe allegedly made a deal with the CIA. Mr. Doe would stay in his position for a while and spy for us, and the CIA would then arrange the Does' defection and resettlement, and ensure their personal and financial security for the rest of their lives. All went fine for some time, with false identities and backgrounds. But then the American bank Mr. Doe worked for in Seattle merged with another, and Mr. Doe was laid off. The CIA left him without assistance, despite an earlier promise to resume financial aid if he became unemployed. The Does sued for an order directing the CIA

to provide them with due process and to pay them the money they were promised.

The issue is whether they can get into a federal district court with their claims. The long-established answer, under the Supreme Court's opinion in *Totten* v. *United States*,[1] has been that they cannot. Under *Totten*, those who spy for us cannot bring lawsuits to enforce our intelligence agencies' promises, because that would require exposure of matters that must be kept secret in the interest of effective foreign policy. The panel opinion effectively overrules *Totten*. It holds that *Totten's* rationale is out of date and that subsequent Supreme Court decisions undermine it. Under *Agostini* v. *Felton*,[2] we cannot do that. Also, in reaching its conclusion, the panel decision puts us is in conflict with the Federal Circuit, which complied with *Totten* in *Guong* v. *United States*.[3]

Aside from the intelligence aspect of this case, the Tucker Act requires those who sue the government for broken promises to do so in the Court of Federal Claims, not in a district court.[4] By allowing the Does' suit to go forward despite the Tucker Act, the panel opinion departs from our precedent in an area where there already existed an intercircuit conflict.

I. *Spies*

The case at bar is factually indistinguishable from *Totten*. In 1861, Abraham Lincoln, on behalf of the United States, personally hired William A. Lloyd to spy

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[1] *Totten* v. *United States*, 92 U.S. 105, 23 L. Ed. 605 (1875).

[2] *Agostini* v. *Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997).

[3] *Guong* v. *United States*, 860 F.2d 1063 (Fed. Cir. 1988).

[4] See 28 U.S.C. § 1491(a).

behind Confederate lines for the duration of the war, agreeing to pay him $200 a month for his services.[5] Lloyd subsequently died intestate, and his administrator, Totten, sued the government in the Court of Claims for Lloyd's unpaid compensation. The Supreme Court held, in the broadest terms, that contracts for clandestine service to the government can never be sued upon. It said that such agreements necessarily contain the term that the parties' "lips . . . were to be for ever sealed," a term that is "implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations."[6] Here is the heart of the Court's holding:

> Our objection is not to the contract, but to the action upon it in the Court of Claims. The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the

[5] This is in the same order of magnitude as the Does' agreement—$200 in 1861 being the equivalent in purchasing power to about $4,000 today (to the extent that economists' inflation factors can indicate equivalence despite technological change).

[6] *Totten*, 92 U.S. at 106.

> agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.[7]

The Does' case is factually indistinguishable from *Totten*. Like William Lloyd, the Does were engaged to provide secret services to the United States behind enemy lines. Like Lloyd, they served to the great benefit of the United States in circumstances that could have gotten them killed. And like Lloyd, they allegedly got stiffed by the government providing less compensation than required by the contracts when the time came for the United States to pay up.

The panel held, however, that *Totten* is no longer good authority. As for the contractual aspects of *Totten*, the *Doe* panel held that *Totten* was inapplicable for two reasons:

[7] *Id.* at 106-07.

First, . . . unlike Totten, the Does do not seek only enforcement of a contract. Rather their principal concern at this point . . . is to compel fair process and application of substantive law to their claims within the Central Intelligence Agency[ ]. . . . Second, *Totten* assumed "publicity" inconsistent with the implicit promise of secrecy as inherent in any judicial proceeding and did not consider whether there are means to conduct judicial proceedings without unacceptable attendant "publicity." Since *Totten*, courts, including the Supreme Court, have developed means of accommodating asserted national security interests in judicial proceedings. . . .[8]

The panel then reinterprets the remainder of *Totten* as "an early expression of the evidentiary state secrets privilege," which only allows for dismissal "*after* complying with the formalities and court investigation requirements that have developed since *Totten*."[9]

As Judge Tallman's dissent points out, every aspect of this rationale is mistaken. The most obvious way that the opinion is wrong is that, no matter how much the courts have developed routines for handling assertions of official secrets, a lower court cannot overrule the Supreme Court. Whether subsequent Supreme Court authority implicitly undermines a Supreme Court decision or not, lower courts must follow and apply a controlling Supreme Court decision. As the Court said in *Agostini*, "[w]e reaffirm that if a precedent of this Court has direct application in a case, yet appears to

[8] *Doe* v. *Tenet*, 329 F.3d 1135, 1147-48 (9th Cir. 2003) (internal quotations omitted).

[9] *Id.* at 1149, 1150 (emphasis in original).

rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[10] The Supreme Court can overrule *Totten*. We cannot.

Second, the gossamer distinctions the panel tries to draw between the Does' and Totten's claims for the purpose of defeating *Totten's* language about implied secrecy terms do not amount to anything. Whether it is called a plea for fairer process or a simple contract claim for damages, the Does, like Totten's decedent, sue the government to obtain a remedy for its breach of an agreement to compensate them for intelligence services. In both cases, the engagements were secret, obviously and necessarily so, since doubtless both engagements involved the commission of serious crimes in the locations where the intelligence agents were to perform them. Both also would amount to serious provocations by the United States in the eyes of the governing forces in those locations.

The panel's contention that the purposes of *Totten* can be served by the CIA asserting the state-secrets privilege, which would then permit in camera inspection of papers by the district court and so forth, leaves out the most important purpose of all: to keep the whole engagement utterly and entirely secret. I see no reason that progress in judicial techniques should make any difference. Intelligence is such an ancient part of conflict that the Bible suggested nothing novel when Joshua sent spies to reconnoiter Jericho.[11] Circum-

[10] *Agostini*, 521 U.S. at 237, 117 S. Ct. 1997 (internal quotation omitted).

[11] Joshua 2:1, et seq.

stances have not changed materially. The very existence of the engagement has to be secret and has to remain secret. If a lawsuit is filed but some papers remain secret, that is not enough. An intelligent observer, knowing something of the events, can figure out from the barest indications in a lawsuit what it is all about. As *Totten* says, "such services are sometimes indispensable to the government," and "[a] secret service, with liability to publicity in this way, would be impossible."[12] Sometimes, to avoid provocations to war or other diplomatic imbroglios, the government has to avoid disclosing what it did, even long after it has done it. Spying is among the "matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties."[13]

The panel's assurances that there is nothing to fear are not enough in light of *Totten* and its purposes. Requiring the CIA to abide by the formalities of making a privilege claim will involve the CIA having to deny or disclose the very existence of the secret relationship. Even asserting that there is a secret to protect, as the state-secrets privilege used in other contexts requires, amounts to letting the cat out of the bag. It is such disclosure of the relationship's very existence that *Totten* sought to avoid. And where there is no espionage relationship to protect, the CIA will have to say as much. That will make all non-denials effectively confirmations.

The panel's attempt to interpret *Totten* so narrowly that it does not even apply to a case materially indis-

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[12] *Totten*, 92 U.S. at 107.

[13] *Id.* at 106.

tinguishable from it puts us in conflict with the Federal Circuit. In *Guong* v. *United States*, the plaintiff tried to distinguish *Totten* on the ground that the CIA had hired him as a saboteur in North Vietnam, and not as a spy.[14] The Federal Circuit rejected the distinction and any other narrowing of *Totten*: "*Totten* stands for the proposition that no action can be brought to enforce an alleged contract with the government when, at the time of its creation, the contract was secret or covert."[15]

Guong also rejected the plaintiff's attempt, similar to the Doe panel's, to assimilate *Totten* into cases about the state secrets evidentiary privilege. Privilege cases, including *Webster* v. *Doe*[16] and *United States* v. *Reynolds*,[17] do not involve engagements of spies in foreign countries, but rather disclosures during litigation about other kinds of secrets. As *Guong* held, "[a] close reading of *Reynolds* reveals that it does not limit or modify the authority of *Totten* or its rationale."[18] *Guong* also makes the point that *Totten* is not limited to currently active spies. Even in *Totten*, there was no direct risk of harm from ongoing conflicts, because the Civil War had been over for ten years when the Court decided the case.[19] Thus, in the Federal Circuit, unlike in the Ninth Circuit after *Doe*, *Totten* remains good law.

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[14] *Guong*, 860 F.2d at 1065.

[15] *Id.*

[16] *Webster* v. *Doe*, 486 U.S. 592, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988).

[17] *United States* v. *Reynolds*, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953).

[18] *Guong*, 860 F.2d at 1066.

[19] *See id.* at 1065.

II. *Tucker Act*

The Tucker Act grants jurisdiction to the Court of Federal Claims to hear contract actions against the United States.[20] *Totten* itself was brought under a predecessor to the present Tucker Act.[21] The Tucker Act's conferral of jurisdiction on the Court of Federal Claims has been read to be exclusive of district court jurisdiction when the amount at stake is greater than $10,000.[22]

The panel opinion, however, reads the Tucker Act narrowly, so that even though the Does' claims are in the first instance dependent on the contract, the Does can proceed in district court. The panel so holds because the Does purport to base their claims on a denial of due process and phrase the relief they seek as declaratory and injunctive. Those distinctions have no force, however, as we held in *Tucson Airport*.[23] There is apparently a circuit conflict between *Tucson Airport* and the District of Columbia Circuit's decision in *Transohio Savings Bank* v. *Director, Office of Thrift Supervision*.[24] But this issue should not have been

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[20] *See* 28 U.S.C. § 1491(a)(1).

[21] *See Guong*, 860 F.2d at 1067 (Nichols, J., concurring).

[22] *See Tucson Airport Auth.* v. *Gen. Dynamics Corp.*, 136 F.3d 641, 646 (9th Cir. 1998); see also 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

[23] *Tucson Airport*, 136 F.3d at 647 ("Because the United States' obligation is in the first instance dependent on the contract, these claims are contractually-based.").

[24] *Transohio Sav. Bank* v. *Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992); *see Tucson Airport*, 136 F.3d at 647-48 ("Notwithstanding the similarities between this case and *Transohio*, to the extent that the teachings of *Transohio* relating to constitutional claims are inconsistent with the ruling case law of this court, we will not follow them.").

reached here, because the case should have been dismissed at the outset because it was based on a covert engagement.

III. *Conclusion*

I sincerely hope that Totten's decedent, William Lloyd, was the only spy the United States has ever failed to pay what it promised (assuming Lloyd was telling the truth), and that the failure occurred only because Lincoln was assassinated before he could see to payment. I hope that the Does' account is fictional (though I do not intimate that it is, having no knowledge). Little could be worse for our ability to engage spies than insecurity about whether they will get what was promised to them. If what the Does allege is true, a serious injustice has been done to them, and the injustice to them is seriously harmful to the long-term security interests of the United States.

Nevertheless, the judicial branch cannot right such a wrong without disclosure of the engagement's existence, which, as *Totten* said, must remain forever secret. It will not do to have word circulating in whatever former Iron Curtain country the Does come from that the collapse of its totalitarian regime was brought about partly by CIA spies and not wholly by its own people's thirst for freedom. Joshua needed spies, Lincoln needed spies, we needed spies to deal with the Soviet empire, and spies will be needed as long as there are men on earth. Judicial determination of what must remain secret, even after in camera inspection of documents, is no substitute for dismissal at the outset, because the CIA cannot come into court and assert the existence of a secret without revealing that there is a secret. The use of spies is far more humane than some

of the alternatives for dealing with serious international conflicts. And their use must remain secret.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Western Washington (Seattle)

No. 01-80052
DC# CV-99-1597-RSL

JOHN DOE, ET AL., RESPONDENTS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, ET AL., PETITIONERS

[Filed: Apr. 13, 2001]

ORDER

Before: KOZINSKI and RYMER, Circuit Judges

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 10 days of this order, petitioners shall perfect the appeal pursuant to Federal Rule of Appellate Procedure 5(d).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Western Washington (Seattle)

No. 01-80052
DC# CV-99-1597-RSL

JOHN DOE, ET AL., RESPONDENTS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, ET AL., PETITIONERS

[Filed: Aug. 2, 2001]

ORDER

Before: KOZINSKI and RYMER, Circuit Judges

Respondents' motion to clarify the April 13, 2001, order is granted. The April 13, 2001, order is amended to add the following after the last sentence of the order: "Respondents' cross-petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is denied."

APPENDIX E

UNITED STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C99-1597L

JOHN DOE AND JANE DOE, PLAINTIFFS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Mar. 14, 2001]

ORDER GRANTING DEFENDANTS' MOTION FOR AN INTERLOCUTORY APPEAL AND FOR A STAY

This matter comes before the Court on defendants' motion for certification of interlocutory orders and for a stay of further proceedings. For the reasons discussed below, defendants' motion is granted.

I. DISCUSSION

A. Interlocutory Orders

On June 7, 2000, this Court issued an Order denying defendants' motion to dismiss for lack of jurisdiction or alternatively, for failure to state a claim. *See Doe* v.

Tenet, 99 F. Supp. 2d 1284 (W.D. Wa. 2000). On January 22, 2001, this Court denied defendants' motion for summary judgment or alternatively, renewed motion to dismiss. *See* Order dated Jan. 22, 2001. Defendants seek certification for interlocutory appeal of these two orders under 28 U.S.C. 1292(b).

A district court has the discretion to certify interlocutory orders when three conditions are met: (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) an immediate appeal from the order may advance the ultimate termination of the litigation. *See* 28 U.S.C. 1292(b). The moving party bears the burden of establishing that exceptional circumstances exist that "justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 475 (1978) (internal citation omitted).

A controlling question of law is one that could materially affect the outcome of the case in district court. *See In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981). Generally, "a difficult central question of law which is not settled by controlling authority" is implicated. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 878 F. Supp. 1078, 1081 (N.D. Ill. 1995) (internal citation omitted). Here, the question of whether the *Totten* doctrine bars plaintiffs' constitutional claims is certainly a controlling question of law. If, as defendants allege, it were deemed that plaintiffs' due process claims are barred because they implicate a contract for secret services which cannot be disclosed, this Court would lack subject matter jurisdiction. The first factor of § 1292(b) is met.

Next, the Court must determine whether a substantial ground for difference of opinion exists. Interlocutory appeal should not be utilized merely to provide review of a ruling in "hard cases." *United States Rubber Co.* v. *Wright*, 359 F.2d 784, 785 (9th Cir. 1966). Substantial grounds for difference of opinion may be demonstrated by conflicting opinions of courts that have interpreted the same legal issue. *See Dorward* v. *Consol. Rail Corp.*, 505 F. Supp. 58, 59 (E.D. Pa. 1980). Limited case law on an issue is another factor that weighs in favor of establishing substantial ground for difference of opinion. *See Ovando* v. *Los Angeles*, 92 F. Supp. 2d 1011, 1025 (C.D. Cal. 2000).

A recently issued federal opinion disagrees with this Court's holding in *Doe v. Tenet*, 99 F. Supp. 2d 1284 (W.D. Wa. 2000). In *Kielczynski* v. *United States Central Intelligence Agency*, 2001 WL 173322 (E.D.N.Y. Feb. 20, 2001), the plaintiff alleged that he was a former CIA spy and that the CIA breached his employment contract regarding citizenship and health benefits. He alleged that his due process rights were violated because he did not receive a hearing prior to the termination of his contract. The *Kielczynski* court discussed the instant case and declined to adopt its holding that plaintiffs' due process claims could go forward. *See id.* at *9 (*citing Doe* v. *Tenet*, 99 F. Supp. 2d at 1287). It did not believe that the reasoning of *Doe v. Tenet* was consistent with the view of the Second Circuit or with the *Totten* doctrine.

While this Court recognizes that there are substantial factual differences between *Kielczynski* and the case at bar, the particular legal questions as to whether *Totten* bars the constitutional claims of former CIA spies is similar. The Ninth Circuit may take a less

or more expansive view on the application of the *Totten* doctrine to plaintiffs' constitutional claims. The existence of conflicting opinions and that lack of a precedential case on point demonstrates a substantial ground for difference of opinion.

Finally, the Court must determine whether an interlocutory appeal will materially advance the termination of litigation. The central issue is whether a reversal would obviate the need for a trial. *See Nobell, Inc.* v. *Sharper Image Corp.*, 1992 U.S. Dist. LEXIS 20114, *10 (N.D. Cal. June 12, 1992). If the Ninth Circuit were to find that plaintiffs' claims were barred by the *Totten* doctrine, a reversal of this Court's orders would likely result in a dismissal of plaintiffs' claim. This factor is satisfied. Defendants have met their burden of establishing the exceptional circumstances exist in this case that warrant the certification of this Court's orders for interlocutory appeal.[1]

Stay of District Court Proceedings

When a stay is requested, the Court must consider the competing interest that will be affected by the grant or denial of a stay. Those interests include the possible damage that may occur from granting the stay, the hardship which a party may suffer if required to go forward, and other concerns of justice in terms of simplifying or complicating issues, proof, and questions of law. *See Filtrol Corp.* v. *Kelleher*, 467 F.2d 242, 244 (9th Cir. 1973).

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[1] Contrary to plaintiffs assertions, it is not necessary for defendants to invoke the state secrets privilege to establish exceptional circumstances. It is clear to the Court that this case involves potentially sensitive information and the criteria of 1292(b) are met. This is sufficient to show exceptional circumstances.

Plaintiffs argue that a stay would only prolong this litigation, which would harm plaintiffs who are old and in ailing health. Plaintiffs urge the Court to deny the stay because defendant can seek protection of sensitive discovery materials by requests to the Court or by invoking the state secrets privilege. If this case went forward, defendants argue that filing an answer to plaintiffs' complaint and partaking in discovery could cause great risk of harm to national security.

The Court finds that it would be an inefficient use of judicial and attorney resources to allow discovery to continue, because the Ninth Circuit's decision in this case could negate the need for discovery. This case is stayed pending a decision from the Ninth Circuit on the interlocutory appeal of this Court's Orders.

II. CONCLUSION

For the foregoing reasons, defendants' motion for interlocutory appeal of this Court's June 7, 2000 and January 22, 2001 Orders is GRANTED.[2] Defendants' request for a stay is GRANTED pending the outcome of the interlocutory appeal. The Clerk of the Court is

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[2] Plaintiffs requested that the *Totten* issue be certified for appeal, rather than the entirety of bother orders. However, once a district court certifies any question of law for interlocutory appeal, the appellate court may exercise jurisdiction over any issue included within the order. Jurisdiction applies to the order and not to a particular question certified by the district court. *See Yamaha Motor Corp.* v. *Calhoun*, 516 U.S. 199 (1996).

directed to send copies of this order to all counsel of record.

DATED this 14th day of March, 2001.

/s/ ROBERT S. LASNIK
ROBERT S. LASNIK
United States District
Judge

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C99-1597L

JOHN DOE AND JANE DOE, PLAINTIFFS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Jan. 22, 2001]

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, RENEWED MOTION TO DISMISS

The Court already has described the facts and the procedural history of this case in its June 7, 2000 Order ("Order"). See *Doe* v. *Tenet*, 99 F. Supp. 2d 1284 (W.D. Wa. 2000). Defendants renew their motion under Federal Rule of Civil Procedure 12(b)(1) to dismiss for lack of subject matter jurisdiction. They also moved for summary judgment under Federal Rule of Civil Procedure 56(c), alleging that there are no disputed material facts regarding plaintiffs' claims of deprivation of property and liberty rights without due process. For

the reasons stated below, the Court denies these motions.

I. DISCUSSION

A. Renewed Motion to Dismiss[1]

Defendants argue that plaintiffs' claims should be dismissed for lack of subject matter jurisdiction because the *Totten* doctrine bars all claims, contract or otherwise, regarding the enforcement of secret agreements with the government.[2] See *Totten* v. *United States*, 92 U.S. 105 (1875). Defendants' arguments that the primary basis of plaintiffs' case is a secret agreement and that the litigation of plaintiffs' case therefore jeopardizes national security is unpersuasive. It is true that federal courts lack the jurisdiction to review a national security issue, such as the Navy's revocation of security clearance for one of its employees. See *Brazil* v. *United States Dep't of the Navy*, 66 F.3d 193, 196 (9th Cir. 1995). It is also true that federal courts should not review government decisions once a formal claim of states secret privilege has been invoked. See *United States* v. *Reynolds*, 345 U.S. 1, 5 (1953).[3]

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[1] Plaintiffs contend that defendants' motion is a thinly disguised motion for reconsideration, rather than a renewed motion to dismiss. Defendants disagree but do argue that even if this motion were a motion for reconsideration, it would "pass[] muster" because this Court's ruling on *Totten* was in plain error.

[2] Defendants repeat several *Totten*-based arguments in their renewed motion that the Court has already discussed in its Order. The Court will not revisit these arguments.

[3] Defendants argue that there is no need to invoke the privilege, and refer to footnote 26 of *Reynolds*, in which the Court states that the privilege has not been formally invoked in cases where "it was so obvious that the actions should never prevail over the privilege." In the instant case, it is not obvious that military

However, this case is not like *Brazil*, where a national security issue was involved, or *Reynolds*, where the privilege was invoked. Rather, this case concerns plaintiffs' procedural and substantive due process rights with regard to whether plaintiffs are entitled to certain financial, health and other benefits. The constitutional claims of plaintiffs must be balanced against the government interests in confidentiality. See *Webster* v. *Doe*, 486 U.S. 592 (1988).

Accordingly, defendants' renewed motion to dismiss for lack of subject matter jurisdiction is denied.

B. Procedural Due Process

In their first motion to dismiss, defendants claimed not to know what PL-110[4] was. Now, they acknowledge not only the existence of PL-110, but also the existence of CIA internal regulations concerning the PL-110 program and the financial benefits accorded to defectors. CIA internal regulations dated January 15, 1981, June 23, 1981, July 13, 1990, January 4, 1999 and June 25, 1999 show the existence of a CIA policy to provide financial support to defectors.[5] Additionally, a letter from the CIA to the Department of Justice, dated December 12, 1988, states: "Certainly, the CIA believes it has an obligation to support each of its

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secrets or national security are at stake in the Does' attempt to regain financial and other benefits from the CIA.

[4] 50 U.S.C. 403h.

[5] The various regulations have different policies regarding the termination of financial support. For example, the July 13, 1990 regulation states that the CIA's responsibility normally terminates when a defector became a United States citizen. The January 4, 1999 regulation states that the CIA may continue to provide financial support even after citizenship is acquired, if circumstances warrant.

[redacted] for a reasonable period of time and, in some cases, based upon unique circumstances such as illness, age, or indigence, this commitment may be for life." Defendants' initial denial of knowledge of PL-110, followed by their subsequent acknowledgment of PL-110 and related regulations, weaken their credibility.

Defendants have submitted the declaration of William H. McNair, an information review officer for the CIA, to support their contention that while CIA regulations regarding PL-110 may exist, there is no internal or external regulation, statute, policy or practice that *entitles* plaintiffs to lifetime financial benefits.[6] At most, defendants contend the CIA's internal regulations give the CIA director the discretion to allow defectors into the United States and to extend benefits. Therefore, since the allotment of benefits is discretionary, defendants argue that plaintiffs have no enforceable rights to such benefits.

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[6] In a related motion, plaintiffs have moved to strike the following two sentences from the McNair declaration:

> I can inform the court unequivocally that there are *no* Agency or other US federal regulations that require the CIA to provide lifetime subsistence assistance to individuals brought into the United States under the authority of PL-110. Neither PL-110, nor any other law, statute, regulation, internal policy, unstated principle or anything else has ever before, or does now, obligate the Agency to provide any form of lifetime financial assistance to individuals brought into the United States by the CIA under the Authority of PL-110.

McNair Decl. ¶ 5. (emphasis in original). The Court will interpret the first sentence as McNair's declaration that his search revealed no such "Agency or other US federal regulations" that require the CIA to provide lifetime subsistence. The Court will disregard the legal conclusion in the second sentence, regarding the CIA's obligation under any law, statute, policy or principle.

Next, defendants assert that a government agency's internal policies and practices are not binding and do not have the force of law. See *James* v. *U.S. Parole Comm'n*, 159 F.3d 1200, 1205 (9th Cir. 1998). While it is true that the CIA's internal regulations do not have the force of law, plaintiffs' claim of entitlement to financial and other benefits is based not only on the regulations, but also on promises made to them and on the surrounding circumstances. A plaintiff's property right may exist if words, conduct or circumstances indicate a mutually explicit understanding between the parties. See *Perry* v. *Sindermann*, 408 U.S. 593, 600-01 (1972); *Orloff* v. *Cleland*, 708 F.2d 372, 377 (9th Cir. 1983). Here, plaintiffs allege that they were promised lifetime financial benefits by the CIA, and that the payment of such benefits for several years indicates a mutually explicit understanding that a property right existed.[7] Because there are material disputed facts regarding CIA internal regulations, and because plaintiffs can sustain a property right claim under *Sindermann* defendants' motion for summary judgment on the procedural due process property claim is denied.

In addition to a due process claim alleging deprivation of property, plaintiffs allege a deprivation of their liberty without due process. Plaintiffs allege that

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[7] Defendants assert that this Court's Order was incorrect in its statement that plaintiffs have a right to procedural due process because defendants provided an appeals process where it was not mandatory to do so. It is true that a constitutional entitlement cannot be created merely because a state has, in its discretion, granted an appeals process in the past. See *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981). However, plaintiffs assert a basis for their property interest under *Sindermann* and therefore have a stronger basis for due process than did the plaintiff in *Dumschat*.

they cannot obtain jobs in the United States because the CIA has withdrawn its support in creating and verifying credentials for them. Defendants argue that plaintiffs have no liberty interest, because they are not entitled to the jobs they previously had or jobs they desire to have. However, plaintiffs have not stated that Mr. Doe cannot find a job in the financial industry; their claim is that Mr. Doe cannot find any job without the CIA's support, and that accordingly they are prevented from practicing the "common occupations of life."

Defendants argue next that plaintiffs have not established that their only means of supporting themselves is to leave the United States and work in Eastern Europe. Plaintiffs maintain that they cannot find employment in the United States, and must move to Eastern Europe, where they have relatives and may be hired for their language skills. Viewing the record in the light most favorable to plaintiffs, as Rule 56 requires, plaintiffs' claim for deprivation of liberty interests without due process raises genuine issues of material fact for trial and defendants' motion for summary judgment is denied.

C. Substantive Due Process

Plaintiffs assert a substantive due process claim based on the government's failure to protect them from harm in the event that they must return to Eastern Europe to earn a living.[8] There are two exceptions to the general rule that a state's failure to protect an individual against private violence does not violate due process: (1) when the state takes a person into custody

[8] Plaintiffs fear returning to their native country because they will be recognized as spies by the police or the agents of their country.

and holds the person against his will to ensure his security, or (2) when the state affirmatively places a person in a dangerous situation. See *Huffman* v. *County of Los Angeles*, 147 F.3d 1054, 1059 (9th Cir. 1998).

As for the first exception, defendants argue that plaintiffs were not in physical custody of the CIA at the time of the injury, and therefore have not been deprived of due process. But the Supreme Court has held that a state's affirmative act of restraining an individual's freedom to act may occur "through incarceration, institutionalization, or other similar restraint of personal liberty." *DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1982). Thus, the Court has not held physical custody to be a necessary element of a substantive due process claim. Moreover, the Ninth Circuit has held that when the government places a person in danger by transferring him from his native country to the United States to testify, the government creates a special relationship and owes the person protection from liberty deprivation. See *Wang* v. *Reno* 81 F.3d 808 (9th Cir. 1996). Like the plaintiff in *Wang*, plaintiffs here fear repercussions from their native country because of the services performed for the United States government.

As for the second exception, defendants argue that plaintiffs have not demonstrated the necessary elements of causation and deliberate indifference. Plaintiffs respond that causation of the dangerous situation is clearly shown by the fact that plaintiffs would not fear for their lives if the government had not placed them in danger by forcing them to perform espionage. The fact that the government is the party that allegedly coerced plaintiffs to spy and now will not give plaintiffs

the aid promised, forcing plaintiffs to return to Eastern Europe to face possible injury or death, may well constitute deliberate indifference. Accordingly, defendants' motion for summary judgment on plaintiffs' substantive due process claim is denied.

D. Estoppel

In addition to alleging due process violations, plaintiffs claim that defendants owe them lifetime benefits on theories of promissory and equitable estoppel. Promissory estoppel is available against the government where the government's actions amount to misconduct. *See Watkins* v. *United States Army* , 875 F.2d 699, 706 (9th Cir. 1989). Defendants argue that plaintiffs cannot assert promissory estoppel against the government, because it has not waived its sovereign immunity. However, the cases cited by defendants concern the Tucker Act and secret contracts under *Totten*. *See, e.g. Jablon* v. *United States*, 657 F.2d 1064 (9th Cir. 1981). In it previous Order, the Court addressed these exact arguments and their inapplicability to this case, and there is no need to do so again.

Plaintiffs argue that they can assert equitable estoppel against the government in certain situations. *See Heckler* v. *Cmty. Health Servs.*, 467 U.S. 60-61 (1984) (equitable estoppel available where citizen have interest in "minimum standards of decency, honor, and reliability in their dealings with the government"). Defendants contend that plaintiffs have not sufficiently pleaded the elements of equitable estoppel. Those elements are:

> (1) the party to be estopped knows the facts, (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has a right to believe is so intended, (3) the party invoking estoppel must be ignorant of the true facts, and (4) he or she must detrimentally rely on the former conduct. When a party seeks to invoke equitable estoppel against the government, we additionally require a showing that the agency engaged in "affirmative conduct going beyond mere negligence" and that "the public's interest will not suffer undue damage" as a result of the application of this doctrine.

Lehman v. *United States*, 154 F.3d 1010, 1016-17 (9th Cir. 1998) (internal citations omitted). Defendants argue that plaintiffs have not pleaded reliance, nor alleged that the government's conduct went beyond mere negligence, nor demonstrated that its public interest will not be hardened by the application of estoppel.

But an examination of plaintiffs' Second Amended Complaint ("Am. Comp.") demonstrates that plaintiffs have asserted reliance. Am. Comp. ¶¶ 4.4., 4.12, 4.13, 4.16. By alleging that plaintiffs informed the government of the threat they faced if they were to return to Eastern Europe, and that the government arbitrarily rejected their plea for the promised assistance, plaintiffs have alleged more than mere negligence. Am. Comp. ¶¶ 4.22, 5.1, 5.2.. Finally, the public interest will not be harmed. The Court understands the need for confidentiality and has the power to allow motions to be filed under seal and heard in closed hearings. Because there are genuine issues of material fact as to plaintiffs' estoppel claims, summary judgment cannot be granted.

II. CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment and renewed motion to dismiss are DENIED.[9]

The Clerk of the Court is directed to send copies of this order to all counsel of record.

DATED this 22nd day of January, 2001.

/s/ ROBERT S. LASNIK
ROBERT S. LASNIK
United States District
Judge

[9] In connection with this motion, plaintiffs filed a motion to strike portions of defendants' reply. The three arguments and the one exhibit that plaintiffs allege were introduced in the reply were not factors considered in the Court's decision to deny summary judgment. Accordingly, plaintiffs' motion to strike is denied.

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C99-1597L

JOHN DOE AND JANE DOE, PLAINTIFFS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND THE UNITED STATES OF AMERICA, DEFENDANTS

June 7, 2000

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

LASNIK, District Judge.

Plaintiffs, former Cold War spies who were resettled in the United States with the assistance of the Central Intelligence Agency ("CIA"), have sued the CIA for ceasing to pay an allegedly agreed-upon financial stipend to plaintiffs and for the CIA's treatment of plaintiffs' administrative appeal of the CIA's denial of that stipend. Plaintiffs allege violations of their procedural and substantive due process rights under the

United States Constitution, and also seek declaratory, injunctive, and mandamus relief requiring the CIA to resume payments to plaintiffs.

This matter comes before the Court on defendants' Motion To Dismiss and plaintiffs' Motion For Preliminary Injunction. The Court has considered the briefs and supporting papers submitted by the parties, and heard oral argument on April 25, 2000. For the reasons discussed below, the Motion To Dismiss is granted in part and denied in part and the Motion For Preliminary Injunction is denied.

I. FACTUAL BACKGROUND[1]

Plaintiffs John and Jane Doe were formerly citizens of a foreign country that, at the time, was considered an adversary of the United States.[2] Plaintiffs were well educated professionals in their country of origin, and Mr. Doe was a high-ranking diplomat with that country's foreign service. For a period during the Cold War, Mr. Doe served in a senior diplomatic post in his country's embassy in another foreign country.

While working in that position, Mr. Doe and his wife approached a person they knew to be affiliated with the

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[1] For purposes of ruling on defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court assumes the truthfulness of plaintiffs' factual allegations. Accordingly, the facts described herein are those facts alleged by plaintiffs in the Second Amended Complaint and other pleadings. The Court did not assume these facts to be true in ruling on that part of defendants' motion to dismiss addressing the issue of jurisdiction. See discussion *infra*.

[2] The parties have excluded certain names and details in order to protect both the safety of plaintiffs and what the United States may consider to be national security information.

United States embassy and requested assistance in defecting to the United States. Plaintiffs allege that CIA agents then sequestered them in a CIA "safe house" for approximately twelve hours, attempting to coerce them and intimidate them into remaining at their diplomatic post and conducting espionage for the United States. The agents allegedly told plaintiffs they could not survive in the United States without the CIA's assistance, and that if they agreed to conduct espionage for a certain period of time, the CIA would arrange for plaintiffs' travel to and resettlement in the United States and would ensure financial and personal security for the remainder of plaintiffs' lives. The agents allegedly told plaintiffs that this program of assistance was approved at the highest levels of the United States government, and was in fact required to be provided under the laws of the United States.

Plaintiffs claim to have initially resisted the CIA agents' requests that they conduct espionage, protesting that they merely wished to defect. The agents, however, persisted. During the twelve hours they spent with the agents, plaintiffs claim the agents made several phone calls to CIA headquarters for instructions and approval of the offers being made to plaintiffs. Finally, in reliance on the CIA's alleged promise that plaintiffs eventually would be resettled in the United States, plaintiffs agreed to assist the United States by remaining at their diplomatic post and conducting espionage.

Plaintiffs allege they carried out their end of this bargain by conducting espionage on behalf of the United States for the specified time period. At the end of that period, agents allegedly pressured plaintiffs to engage in additional, more dangerous, activities. Plain-

tiffs, feeling they had no choice, complied with the new requests and assisted the CIA for an additional period of time.

Finally, the United States government arranged for plaintiffs to be brought to the United States. The plaintiffs spent approximately eight months in a safe house upon their arrival in the United States, where they were debriefed by various persons they understood to be CIA or other government officials. The United States provided plaintiffs with false identities and backgrounds, and offered to place plaintiffs in a semi-retired status with financial and health benefits. Plaintiffs requested that they instead be permitted to integrate into American society and become gainfully employed members of their new community. The CIA agreed, and promised that plaintiffs would be supported for the remainder of their lives to the extent their own earnings were insufficient. CIA agents explained that the CIA was required by law to provide plaintiffs with a "safety net" for the duration of their lives.[3]

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[3] Plaintiffs were told this was required as a result of their "PL-110" status, a term plaintiffs understood to refer to a United States statute or regulation governing persons in their situation. Defendants claim in their brief not to know what "PL-110" refers to, but believe it is a reference to 50 U.S.C. § 403h, which imposes no obligation of assistance on the government. Plaintiffs believe classified regulations implementing 50 U.S.C. § 403h may exist. It is clear that the term "PL-110" has been used by members of the intelligence community. The Court notes that plaintiffs' counsel saw a reference to testimony regarding "PL-110" in one of the CIA's decision documents they were permitted to review. Furthermore, testimony before Congress regarding defectors suggests that "PL-110" is a term used in the intelligence community. *See, e.g., Federal Government's Handling of Soviet and Communist Bloc*

During their first eight months in the United States, the CIA provided plaintiffs with education, medical benefits and a modest monetary living stipend. The educational benefits were intended to form the basis of plaintiffs' new false identities. Plaintiffs were subsequently resettled in the Seattle area, where they initially received a stipend of $20,000 per year in addition to housing, health care and other benefits. Over time, that stipend increased to $27,000. Beginning in 1987, Mr. Doe obtained professional employment with the assistance of the CIA, which provided Mr. Doe with a false resume and references. As his salary increased, the amount of the stipend provided by the CIA was decreased accordingly.[4] During the latter several years in which plaintiffs received a stipend, the total of the stipend and Mr. and Mrs. Doe's salaries equaled $27,000.

In 1989, Mr. Doe and the CIA agreed that if Mr. Doe's salary increased to $27,000, the CIA would cease paying him his stipend. Mr. Doe claims he specifically asked for assurances that if his employment were terminated, the CIA would resume paying the stipend. CIA officials allegedly assured Mr. Doe that payment of the stipend would be resumed in such circumstances, and assured Mr. Doe that the CIA would always "be there" for plaintiffs and that the CIA would help him find a new job if he were terminated.

Defectors: Hearings Before the Perm. Subcomm. On Investigations of the Senate Comm. On Gov. Affairs, 100th Cong. 102 (1987) (testimony of William W. Geimer, President, Jamestown Foundation); *see also, id.* at 191 (staff statement).

[4] Mrs. Doe also worked on a part-time basis; her earnings were apparently minimal.

In February 1997, the bank for which Mr. Doe worked was involved in a corporate merger. Mr. Doe's position was eliminated and he was laid off. While Mr. Doe made an effort to find new work, he had advanced in age by this time, his limited training was in a field in which corporate downsizing was occurring throughout the country, and he was restricted in his job search by the CIA's security arrangement, which required him to continue using the false background and false identity he had been given. Even though he was required to use the false resume and background the CIA had provided him, the CIA refused to assist him as it had in the past with finding a new job. Since that time, Mr. Doe has been unable to find a job.

Plaintiffs are now in serious financial straits. Both plaintiffs suffer from health problems, and have incurred substantial health care expenses. For a period of time, plaintiffs traveled to Eastern Europe to live with relatives in order to take advantage of more affordable health care and a lower cost of living. However, when Mr. Doe was recognized by an individual he knew to be a former member of his native country's security police, plaintiffs feared for their safety and returned to Seattle.

Plaintiffs now allege that if defendants do not resume payment of their monetary stipend, they may again be forced to return to Eastern Europe to live with relatives in order to survive financially. Plaintiffs fear that such a move will put them at great risk should they be recognized or found by agents of their native country's security police.

II. PROCEDURAL BACKGROUND

When Mr. Doe lost the job the CIA had helped him obtain, he and his wife contacted the CIA in the required manner. Plaintiffs wrote to their contact, providing the details of their situation and requesting assistance. Four months later, they received a letter from a CIA official. That letter stated that while the CIA "sympathize[d] with the situation" plaintiffs found themselves in, "due to budget constraints" the agency was unable to provide any additional assistance. The letter also stated that the CIA continued to be "concerned for [plaintiffs'] security and welfare and would hope to be flexible should [plaintiffs] require assistance in the future." Doe Decl. ¶ 15, Exh. 5.

Plaintiffs made further unsuccessful attempts to obtain assistance from the agency, and finally sought legal representation. The CIA granted plaintiffs' counsel security clearances for purposes of representing plaintiffs in their claim with the CIA. During an August 1997 meeting at which plaintiffs' attorneys were granted security clearance, an attorney from the CIA's general counsel's office explained that the CIA had retrospectively made a subjective assessment of the espionage activities performed by plaintiffs for the United States, and had determined that plaintiffs had already received "adequate" compensation for their services. When plaintiffs' counsel posed questions to the CIA attorney, she replied that she had no further information, and that she was simply a "messenger" with no knowledge of the substantive facts of plaintiffs' case. Plaintiffs' counsel asked to speak with someone with substantive knowledge or decision making authority, but were refused. Plaintiffs' counsel were told

plaintiffs could appeal the decision to the Director of Central Intelligence ("DCI").

Plaintiffs' counsel prepared an appeal to the DCI. In doing so, they requested a variety of documents from the CIA. For example, counsel requested copies of the regulations governing the appeal process and the rules and regulations applicable to resettled aliens such as plaintiffs. The CIA never responded to these requests.

Plaintiffs' counsel requested access to relevant records, persons with relevant knowledge of facts, and persons responsible for the appeal process. All of these requests were either denied or ignored by the CIA.

Notwithstanding their complete lack of substantive or procedural guidelines, plaintiffs' counsel filed their appeal with the DCI in December 1997. Counsel for the CIA advised plaintiffs' counsel orally that the Deputy Director of Operations (not the DCI) had denied the appeal, and advised plaintiffs' counsel that they could appeal to a panel chaired by former DCI Richard Helms ("the Helms Panel"). Plaintiffs' counsel again requested copies of relevant regulations or rules governing such an appeal, and requested written confirmation that their previous appeal had been denied. The CIA ignored both requests.

Plaintiffs appealed to the Helms Panel, again requesting information on the relevant rules and procedures, the opportunity to appear before the panel to present their case, and the opportunity to confront witnesses. These requests were all either denied or ignored.

Plaintiffs' counsel later were advised orally that based upon the recommendation of the Helms Panel,

the DCI had determined that the CIA should provide plaintiffs with benefits for a period of one year, contingent on plaintiffs' signing a waiver and release of claims. Plaintiffs' counsel were permitted to review the DCI's written decision in a secure location in Washinton, D.C., although the decision document did not bear any classification. Plaintiffs' counsel were not permitted to receive a copy of the document. The written decision did not state the reasons for rejecting plaintiffs' legal arguments and factual assertions, or what evidence had been relied upon in reaching the decision.

Plaintiffs' counsel also was allowed to review a document that appeared to be minutes of the Helms Panel's proceeding. That document indicated that three persons involved in the recruitment, handling, and resettlement of plaintiffs had testified. The brief summary of their testimony indicated that one witness testified that he or she had explained to plaintiffs that their "PL-110" status represented a life-long commitment for personal and financial security.

Plaintiffs' counsel sought clarification of whether the appeal process and the DCI's decision represented a final adjudication of plaintiffs' rights, and if so, how such an adjudication could be premised on a demand for a waiver and release. The CIA did not respond to plaintiffs' counsel's inquiry.

This action ensued following plaintiffs' counsel's inability to obtain clarification or information from the CIA regarding the nature and scope of the agency's decision with respect to plaintiffs' appeal, or the legal, evidentiary, regulatory, or statutory basis for that decision. In their Second Amended Complaint, plaintiffs have stated claims for violation of their due process

rights under the United States Constitution, and for declaratory, injunctive, and mandamus relief requiring the CIA to resume payment of the monetary stipend at issue.

III. DISCUSSION

Defendants have moved, pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss the Second Amended Complaint.[5] First, defendants argue that this Court lacks subject matter jurisdiction over plaintiffs' claims. Second, defendants argue that the Amended Complaint fails to state claims upon which relief may be granted.

A. *Motion To Dismiss For Lack Of Subject Matter Jurisdiction*

In moving for dismissal on the basis of jurisdiction, defendants make three arguments. First, defendants argue that this Court is precluded under the Supreme Court's decision in *Totten* v. *United States*, 92 U.S. 105, 2 Otto 105, 23 L. Ed. 605 (1875) from enforcing "secret agreements." Second, defendants argue that litigation of plaintiffs' claim would involve issues "that are, and must, remain as secret as the existence and substance of any secret agreements themselves." Defs,' Opp. at 5. Third, defendants argue that this Court lacks jurisdiction as a result of the Tucker Act, 28 U.S.C. ¶ 1491(a)(1), which provides that only the United States Court of Claims may exercise jurisdiction over contract claims against the government seeking more than $10,000.

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[5] The parties stipulated to allow filing of a Second Amended Complaint, in which plaintiffs do not assert, but reserve the right to assert, a contract claim against defendants.

First, the Court disagrees with defendants' characterization of this case throughout its pleadings as a "dispute over an alleged contract for secret services." Defs.' Opp. at 5. The plaintiffs have alleged, in relevant part, that defendants' actions violated plaintiffs' due process rights. The Court need not consider whether plaintiffs actually had an enforceable contract with defendants entitling them to the benefits they seek. Nor must the Court, as defendants suggest, make any "explicit or implicit acknowledgment" that such a contract exists.

Regardless of whether a secret contract does exist, there are substantial issues and claims remaining in this case that lie outside the reach of *Totten*. In particular, as described more fully below, plaintiffs have alleged conduct on the part of defendants that, if true, would constitute a violation of plaintiffs' substantive due process rights. In addition, regardless of whether plaintiffs had a contractual entitlement to benefits (which *Totten* might foreclose the Court from recognizing) or a right to benefits arising out of promissory estoppel, equitable estoppel, or a statutory or regulatory right, once the defendants represented to plaintiffs that a process existed through which they could "appeal" the denial of their monetary stipend, defendants assumed an obligation to provide procedural due process to plaintiffs. The allegations here plainly state such constitutional claims, which are not automatically shielded from this Court's review by *Totten*.[6]

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[6] Accordingly, *Guong* v. *United States*, 860 F.2d 1063 (Fed. Cir. 1988), which defendants rely upon, is not directly on point. Unlike the plaintiffs in this case, Guong had no constitutional claims; rather, he sued to recover for breach of an alleged employment

In fact, the Supreme Court has held that the denial of "any judicial forum for a colorable constitutional claim" would raise "serious constitutional questions." *Webster* v. *Doe*, 486 U.S. 592, 603-05, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988) (quoting *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 681, n.12, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986)). While the Court was referring to the government's argument that section 102(c) of the National Security Act precluded judicial review of a constitutional claim against the CIA, the Court also noted that "[e]ven without such prohibitory legislation from Congress, . . . traditional equitable principles requiring the balancing of public and private interests control the grant of declaratory and injunctive relief in the federal courts." *Webster*, 486 U.S. at 604-05, 108 S. Ct. 2047. Here, those "traditional equitable principles" require this Court to exercise jurisdiction over plaintiffs' constitutional claims where those claims raise factual questions outside the scope of a *Totten*-type contract dispute.

Second, litigation of plaintiffs' claims will not require public revelation of the defendants' intelligence gathering methods. As the Supreme Court observed in *Webster*, "the District Court has the latitude to control any discovery process which may be instituted so as to balance [plaintiffs'] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality

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contract with the CIA—a purely contractual claim. In holding that Guong's claim was an unenforceable contract for "secret services" under *Totten*, the Federal Circuit did not address the issue of whether *Totten* would foreclose the courts' consideration of constitutional claims such as those at issue here.

and the protection of its methods, sources, and mission." *Id.* at 604, 108 S. Ct. 2047.

Certainly that portion of plaintiffs' case that is premised on the CIA's procedures for reviewing complaints and appeals does not represent a national security secret. Moreover, with respect to the facts of plaintiffs' case, Defendants have reviewed and approved for public filing all papers filed by plaintiffs thus far. If the CIA does not object to public airing of the allegations already filed in this case, the Court is confident that the case may be litigated without requiring the disclosure of national security secrets. If not, defendants may request leave to submit materials in this matter under seal or *in camera*, or may assert the state secrets privilege recognized in *United States* v. *Reynolds*, 345 U.S. 1, 7-8, 73 S. Ct. 528, 97 L. Ed. 727 (1953).

Finally, defendants' argument that the Tucker Act requires that this case be heard by the United States Court of Claims fails for the same reason its *Totten* argument fails. Plaintiffs are not seeking a money judgment from defendants based on a contract. Plaintiffs are seeking to have this Court determine whether their due process rights were violated, and to have this Court enter an injunctive remedy which could, as a consequence, require defendants to reconsider plaintiffs' request to have their payments resumed. This does not make this case a contract dispute that must be submitted to the United States Court of Claims.

Accordingly, the Court finds that it has subject matter jurisdiction over plaintiffs' due process claims.

B. *Motion To Dismiss For Failure To State A Claim*

Defendant also has moved to dismiss plaintiffs' action pursuant to Rule 12(b)(6) for failing to state claims upon which relief can be granted. The Court will only grant such a motion where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *see* also, *Terracom* v. *Valley Nat'l Bank*, 49 F.3d 555, 558 (9th Cir. 1995). In considering such a motion, the Court assumes the allegations of fact contained in the complaint to be true and construes them in the light most favorable to the non-moving party. *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990).

1. Due Process Claims

Plaintiffs' due process claim appears to the Court to be, in fact, two claims. In alleging that defendants' actions deprived plaintiffs of constitutionally protected property and liberty interests, plaintiffs have stated both substantive and procedural due process claims. Accordingly, the Court must examine whether plaintiffs have alleged a violation of procedural due process, which depends on whether the government has followed proper procedures in depriving plaintiffs of property or liberty interests, and substantive due process, which depends on whether the government's deprivation of plaintiffs' fundamental interests is permissible regardless of the fairness of the procedures used.

a. *Procedural Due Process*

The doctrine of procedural due process requires that the government give a person certain procedural rights before depriving that person of a constitutionally protected property or liberty interest. *See, e.g., Santosky* v. *Kramer*, 455 U.S. 745, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). It is beyond dispute that under the facts as alleged in this case, plaintiffs were afforded very little process. Indeed, the CIA declined even to respond to requests for the relevant rules or regulations governing the agency's appeal process. The only question the Court must decide in determining whether plaintiffs have stated a procedural due process claim is whether plaintiffs were deprived of a constitutionally protected property or liberty interest.

Defendants argue that plaintiffs cannot show that they were deprived of a protected property interest, because "[t]o have a property interest in a benefit, a person must have a legitimate claim of entitlement to it." Def.s' Opp. at 7 (citing *Board of Regents* v. *Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). Defendants argue that an entitlement, which may be created by rules, statutes, regulations, ordinances, or express or implied contracts, does not exist in this case because the contract upon which plaintiffs base their entitlement is a secret agreement, which the Court is precluded from even acknowledging the existence of under *Totten*.

The Court disagrees. Plaintiffs may be able to base their entitlement to receipt of the CIA's monetary stipend on theories other than contract. For example, if plaintiffs are able to prove that they had an entitlement to benefits based on a promissory or equitable estoppel

theory, or if there is a regulatory or statutory basis for their entitlement,[7] then they may be able to show a constitutionally protected property interest, regardless of *Totten*.

In addition to a possible property interest in the benefits they received up until 1997, plaintiffs have alleged a deprivation of their most fundamental liberty interests, including their ability to provide for their basic needs and their personal safety. After plaintiffs assisted defendants by conducting espionage activities, plaintiffs were required to assume new identities in order to resettle in the United States and to protect their safety. This required sacrificing their past professional training, personal relationships, names, and personal histories. With the defendants' assistance, plaintiffs were obliged to establish false identities in order to "engage in the common occupations of life." *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

Now that defendants have ceased payment of a monetary stipend to plaintiffs, and allegedly have refused to assist Mr. Doe in finding new employment, plaintiffs' abilities to engage in the "common occupations of life," which are "essential to the orderly pursuit of happiness by free men," are substantially hindered. *Id.* As the Court recognized in *Meyer*, these activities

[7] The Court notes, for example, that defendants have not disclosed any relevant regulations to plaintiffs or the Court, and that there appears to be some dispute as to whether a regulatory or statutory scheme referred to as "PL-110" entitles plaintiffs to lifelong benefits. *See* discussion *supra* at note 3. Without full briefing and consideration of these issues, the Court is not prepared to find that plaintiffs have no regulatory or statutory basis for their entitlement.

and occupations are encompassed by the Constitution's liberty protection. *Id.*

Furthermore, now that plaintiffs' economic situation may require them to move abroad in order to find a way to support themselves financially, their personal safety is put at risk as well. Plaintiffs believe the espionage activities they performed are well-known to their former government, and that if they return to Eastern Europe, they may be recognized and retaliated against by agents of their former government. This directly implicates plaintiffs' fundamental liberty interests. *See Kallstrom* v. *City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998) (individuals' "interest in preserving their lives . . ., as well as preserving their personal security and bodily integrity" constitutes a "fundamental liberty interest").

Assuming, as the Court must at this stage, that the facts alleged by plaintiffs are true, the Court finds that plaintiffs have alleged facts sufficient to state a claim that their right to procedural due process has been violated.

b. *Substantive Due Process*

Plaintiffs also have alleged conduct supporting a claim that the CIA's conduct has violated their substantive due process rights. Substantive due process violations occur when the state impermissibly deprives an individual of an interest so fundamental, deprivation is prohibited "regardless of the fairness of the procedures used . . ." *Wood* v. *Ostrander*, 879 F.2d 583, 589 (9th Cir. 1989) (*quoting Daniels* v. *Williams*, 474 U.S. 327, 330-32, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)). As it applies here, the Due Process Clause prevents the government from affirmatively placing an individual in

danger, and requires the government to provide for and protect a person with whom it creates a special relationship. *Wang* v. *Reno*, 81 F.3d 808, 818 (9th Cir. 1996).[8]

In *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189, 199-200, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989), the Supreme Court held that when the government creates a special relationship with a person, the substantive component of the Due Process Clause obligates the government to provide for that person's basic needs and to protect him from deprivations of liberty. *Id.*; *see also*, *Wang*, 81 F.3d at 818; *L.W.* v. *Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992).[9] Similar cases have held that the government may not affirmatively place an individual in danger. *See, e.g.*, *Wood v. Ostrander*, 879 F.2d at 589-90; *Ketchum v. County of Alameda*, 811 F.2d 1243, 1247 (9th Cir. 1987).

Here, the complaint alleges both that the government created a special relationship with the plaintiffs and that it has affirmatively put them in danger. Plaintiffs allege that the government created a special relationship with plaintiffs by relying on them to conduct espionage, bringing them to this country and resettling them under false identities, aiding them in

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[8] The analysis of these two protections has been blended together in some cases, and they have been described as exceptions to the general rule that "members of the public have no constitutional right to sue state employees who fail to protect them from harm inflicted by third parties." *L.W.* v. *Grubbs*, 974 F.2d at 121.

[9] While many "special relationship" cases have involved individuals being held in custody, such custody is not required to find that a special relationship has been created. *See, e.g.*, *Wang*, 81 F.3d at 818 (involving government's prosecution witness).

obtaining employment through the use of false backgrounds, and paying them a monetary stipend over the course of the years. Furthermore, plaintiffs allege that the government has failed to provide them with the ability to sustain their most basic needs since it ceased paying their monetary stipend.

Plaintiffs also allege that the government has affirmatively put them in danger. Not only is the government alleged to have placed plaintiffs in danger by asking them to engage in dangerous espionage activities, the government's cessation of plaintiffs' monetary stipend allegedly leaves them with no means of sustaining their basic needs, forcing them to travel to Eastern Europe in search of economic security, where their personal safety would be in danger.

The Court finds that plaintiffs have sufficiently stated a claim that the government violated their substantive due process rights by creating a special relationship with plaintiffs and then failing to provide for their basic needs and protect them from deprivations of liberty, or by affirmatively placing them in danger. Accordingly, the Court will deny the motion to dismiss as to that claim.

2. Equal Protection Claim

Plaintiffs also claim that defendants have violated their right to equal protection by treating them differently from those corporations or persons with whom the government has ongoing relationships or contracts, on the basis that their contract was to provide "secret services." Plaintiffs allege that by invoking the *Totten* doctrine, the government subjects defectors and others who secretly contract with the government to unequal treatment in violation of the Fifth Amendment.

The Court finds that, as to this claim, plaintiffs have failed to state a claim upon which relief can be granted. Equal Protection requires that "all persons similarly circumstanced shall be treated alike." *Plyler* v. *Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982). Thus, plaintiffs must allege "unequal treatment of people similarly situated." *Gilbrook* v. *City of Westminster*, 177 F.3d 839, 871 (9th Cir. 1999).

It is clear that ordinary government contractors and "secret" government contractors are not "similarly situated." The government undoubtedly has a valid interest in making secret contracts that must be treated differently from ordinary government contracts. Furthermore, as defendants have noted in their Motion To Dismiss, plaintiffs have not alleged that the CIA's treatment of their claim to a monetary stipend was unequal to treatment of claims submitted by others. Therefore, the Court finds that plaintiffs have not alleged facts that, if proven, would support their claim under the Equal Protection clause of the Fifth Amendment. That claim will, therefore, be dismissed.

3. Injunctive, Declaratory Judgment, and Mandamus Claims

Defendants have not argued that plaintiffs' claims for injunctive, declaratory, and mandamus relief should be dismissed, except insofar as they argue that these claims are merely cleverly worded contract-based claims precluded from judicial enforcement by *Totten*. As set forth above, there is more at stake in this case than contract rights. Accordingly, the Court finds that plaintiffs have stated claims for an injunction, a declaratory judgment, and mandamus that are sufficient to withstand this Motion To Dismiss.

C. *Motion For Preliminary Injunction*

Plaintiffs have filed a motion for preliminary injunction, seeking to enjoin defendants from denying payment of the monetary stipend to plaintiffs. Where a party seeks an injunction compelling another party to commence performance of some mandatory act, as opposed to prohibiting some conduct, courts are required to be "extremely cautious," as such mandatory injunctions are "particularly disfavored." *Stanley* v. *University of Southern California*, 13 F.3d 1313, 1319-20 (9th Cir. 1994). In the case of a motion for a mandatory injunction, Ninth Circuit law provides that district courts should "deny such relief unless the facts and law clearly favor the moving party." *Id.* at 1320.

Plaintiffs argue that they do not seek a mandatory injunction, but rather seek to preserve the status quo, defining the status quo as the period prior to defendants' wrongful cessation of payments to plaintiffs. However, the motion does not seek to prohibit conduct by defendants; rather, it seeks to require defendants to perform an affirmative act they are not currently performing. Therefore, the Court finds that plaintiffs do seek a mandatory injunction, which is subject to the heightened standard discussed above. Under that standard, the Court is not satisfied that the facts and law "clearly favor" the plaintiffs and the motion for preliminary injunction will be denied.

IV. CONCLUSION

For the reasons stated, the Court finds that it has subject matter jurisdiction over the claims contained in plaintiffs' Amended Complaint and that plaintiffs have stated claims for violation of their substantive and procedural due process rights, and for injunctive, declara-

tory, and mandamus relief. The Court also finds that plaintiffs have failed to state a claim for violation of their equal protection rights, and have failed to establish entitlement to a preliminary injunction.

ACCORDINGLY, it is hereby ORDERED that defendants' Motion To Dismiss is GRANTED with respect to plaintiffs' equal protection claim, but DENIED in all other respects. The Motion For Preliminary Injunction is DENIED.

The Clerk of the Court is directed to send copies of this order to all counsel of record.

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C99-1597L

JOHN DOE AND JANE DOE, HUSBAND AND WIFE,
PLAINTIFFS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Mar. 31, 2000]

SECOND AMENDED COMPLAINT

I. PARTIES

1.1 Plaintiffs.

Plaintiffs, whose true names are not disclosed for reasons of personal security, are proceeding herein by use of pseudonyms, John Doe and Jane Doe. Plaintiffs are husband and wife, are citizens of the United States, and reside in King County, Washington.

1.2 Defendant Director of Central Intelligence.

George Tenet, Director of Central Intelligence and Director of the Central Intelligence Agency ("DCI"), is sued in his official and personal capacities. As DCI, he is charged with exercising the powers and duties of the Central Intelligence Agency in accordance with duly adopted procedures and the laws and Constitution of the United States. As an individual, he is charged with performing his duties under the laws and Constitution of the United States.

1.3 Defendant U.S.A.

The United States of America is responsible, through its agents, including the DCI, for depriving plaintiffs—without due process of law—of assistance and benefits to which they are entitled, and violating plaintiffs' constitutionally protected rights.

II. JURISDICTION AND VENUE

2.1 Subject Matter Jurisdiction.

Jurisdiction is invoked under 28 U.S.C. §§ 1331, 1361 and 2201. Plaintiffs' claims for relief arise under the Fifth Amendment to the United States Constitution.

2.2 Personal Jurisdiction.

This Court has personal jurisdiction over all defendants.

2.3. Venue.

Venue is proper under 28 U.S C. § 1391(e).

III. INTRODUCTION

3.1 Summary.

This is a civil action for declaratory judgment, injunctive relief, and relief in the nature of mandamus.

Plaintiffs seek to require the United States and its agents, as well as the DCI in his personal capacity, to provide a constitutionally adequate and nondiscriminatory process for determining plaintiffs' rights under relevant contracts, statutes and regulations, or agency-fostered expectations, and to cease depriving plaintiffs of their substantive due process rights to liberty.

3.2 The Central Intelligence Agency's Mistreatment of Defectors.

The Central Intelligence Agency (or "CIA" or "Agency") has had a troubling relationship with defectors. While such persons have been and continue to be of vital importance to the Agency and its mission, the Agency frequently mistreats defectors after extracting their useful information and service. During the 1980s, a comprehensive investigation by the Agency's own Inspector General concluded that the Agency's actions and procedures with regard to defectors were grossly unfair and inappropriate. Although certain "reforms" (including creation of a panel responsible for hearing appeals of Agency decisions with regard to defectors) were apparently promised after this report was presented to Congress, the present case illustrates that these "reforms" remain unfulfilled. The Agency continues to exercise its vast and largely unchecked powers to avoid its lawful obligations to defectors, including hiding behind its cloak of secrecy to avoid fair procedures.

3.3 The Misuse of the DCI's Statutory Obligation to Protect Intelligence Sources and Methods.

Recognizing the frequent need for secrecy in the conduct of foreign intelligence, Congress in the legislation establishing the CIA bestowed on the DCI both the power and the obligation to "protect intelligence

sources and methods." Too often, the DCI and other Agency officials misuse this power to avoid lawful obligations and effective checks and balances through Congressional oversight and judicial scrutiny. The power to protect intelligence sources and methods may not and need not be employed to avoid meaningful due process for those seeking fair treatment regarding rights and interests created by the Agency and by Congress or to deprive defectors such as plaintiffs of their rights to substantive due process. Equal protection further demands that those whose property or lives are subject to Agency action be accorded due process like other citizens.

3.4 Misuse of the Totten Doctrine.

The CIA regularly makes promises to and agreements with defectors and others who rely on such promises and agreements as the solemn obligations of the United States. The Agency, however, often does not respect such agreements, ignoring its obligations whenever it chooses to do so. To facilitate this wrongful conduct, the Agency utilizes the so-called Totten Doctrine (*Totten* v. *United States*, 92 U.S. (2 Otto) 105, 23 L. Ed 605, 11 Ct. Cl. 182 (1875)) to block judicial enforcement of its lawful obligations. In many instances, including this one, the application of the Totten Doctrine is inappropriate and not necessary to protect national security and intelligence sources and methods. The availability of the Totten Doctrine, however, causes the Agency to believe not just that it is beyond judicial scrutiny, but that it need provide only those internal procedures that suit its purposes. In the instant case, the Agency cited the Totten Doctrine in response to plaintiffs' complaints of unfair treatment and then ignored plaintiffs' complaints and conducted

internal proceedings that were devoid of fairness and constituted an arbitrary and capricious exercise of unchecked power. The existence of the Totten Doctrine makes full and fair administrative procedures within the Agency all the more essential. If a citizen whose liberty or property is subject to Agency actions has no judicial recourse and must avail himself or herself of administrative procedures conducted in secret, then those procedures must be as rigorously fair as possible.

3.5 Reservation of Rights Regarding Contract Claim.

Plaintiffs have sought and continue to seek to work within the Agency's special needs for confidentiality. Barring success in their attempt to enforce fair internal Agency procedures, however, plaintiffs reserve the right to bring contract claims and challenge the Totten Doctrine at a later time in the Federal Court of Claims, which has exclusive jurisdiction over the contract claims.

IV. PLAINTIFFS' BACKGROUND AND RELATIONSHIP WITH THE AGENCY

4.1 Plaintiffs were formerly citizens of a foreign nation then considered to be an enemy of the United States, and John Doe was a high-ranking diplomat for such foreign nation.

4.2 For a period during the Cold War, plaintiffs were residing in a second foreign nation on diplomatic assignment for the first nation. Plaintiffs resided in the embassy compound and were subject to constant surveillance by the first nation's security service.

4.3 During this time and at great risk, plaintiffs approached a person known to them to be attached to

the United States embassy and requested assistance in defecting to the United States.

4.4 Rather than providing the requested assistance, CIA agents sequestered the plaintiffs in an Agency safe house. The agents employed various forms of intimidation and coercion to convince plaintiffs that they could not survive in the United States without Agency assistance. The agents asserted that, to obtain such assistance, plaintiffs would be required to remain at their current diplomatic post and conduct espionage for the United States for a specified period of time, after which the Agency would arrange for travel to the United States and ensure financial and personal security for life. The agents assured plaintiffs that the assistance being offered was approved at the highest level in Washington and was, in fact, required by the laws of the United States.

4.5 Plaintiffs resisted the requests of the agents, stressing that all they sought was assistance in defecting. The agents persisted, using tactics that induced great fear and uncertainty in plaintiffs.

4.6 During this time, a CIA agent said to be the Chief of Station made several calls to CIA headquarters to receive instructions and approval of the offers being made to plaintiffs. On information and belief, due to the importance of plaintiffs' prospective espionage activities, this "recruitment" would have been personally directed and the inducements made to plaintiffs personally approved by the CIA's Deputy Director of Operations at Langley, Virginia with the knowledge and concurrence of the DCI.

4.7 After being sequestered in an Agency safe house for nearly 12 hours, plaintiffs reluctantly agreed to work "in place" for the United States.

4.8 After carrying out their end of the bargain at great personal risk for the requisite time period, plaintiffs requested that the Agency arrange for their defection and travel to the United States.

4.9 Instead of making immediate arrangements for defection, the Agency pressured plaintiffs to undertake more and different types of espionage activities that would expose plaintiffs to far greater danger and virtually guaranteed that the nature and extent of these activities would become known to the first nation, putting them at life-long risk of retaliation, including the risk of assassination.

4.10 Believing they had no other choice, plaintiffs compiled with these new requests.

4.11 After performing the additional highly dangerous and valuable assignments, plaintiffs were eventually brought to the United States and provided with new names and false backgrounds.

4.12 The Agency designated plaintiffs as having "PL-110" status. The Agency is obligated to provide life-long assistance to all defectors who are brought into the United States under what is referred to as "PL-110 status." On numerous occasions over the years, various Agency representatives told plaintiffs that they had "PL-110 status" and repeatedly assured plaintiffs, both initially as an inducement to conduct espionage and later, that the Agency was required by law to provide plaintiffs with financial and other assistance during their lifetime and to ensure their personal security. In addition to defendants' own admissions in the course of

their relationship with plaintiffs, Lt. General Williams, former Director of the Defense Intelligence Agency, provided congressional testimony that PL-110 status requires life-long support for participants.

4.13 Shortly after arriving in the United States. Agency officials presented plaintiffs with a document ("Document One") to sign, indicating that execution of the document was "required" in order to proceed with resettlement and provision of benefits, but that the document was a mere "formality" and did not change the Agency's commitment or obligation to provide life-long financial assistance and personal security for plaintiffs. In reliance on the Agency officials' representations, and believing they had no other choice, plaintiffs executed the document.

4.14 As soon as permitted by law, plaintiffs became citizens of the United States.

4.15 Using a false name and false resume, and with the Agency's assistance and guidance, John Doe eventually obtained professional employment.

4.16 As John Doe's salary increased over time, the Agency living stipend decreased and eventually was discontinued. During this time, the Agency presented plaintiffs with a second document ("Document Two") setting out the eventual termination of certain financial benefits. The Agency indicated that plaintiffs were required to execute the document. While John Doe was gainfully employed at the time, plaintiffs were concerned about what would happen if John Doe lost his job. In response to this specific question, the Agency official replied with the same assurances other Agency officials had given plaintiffs—namely, that, notwithstanding either Document One or Two, the Agency

would always "be there" for plaintiffs and would renew financial and other assistance if John Doe lost his job. In reliance on these representations, and believing they had no assistance other choice, plaintiffs executed Document Two.

4.17 Document Two expressly reconfirms the Agency's continuing obligation to provide for plaintiffs' security.

4.18 After a number of years of successfully supporting himself and his spouse without Agency assistance, John Doe in early 1997 was laid off from his job due to elimination of his position following a corporate merger.

4.19 John Doe's efforts to find new employment were limited by his security arrangements with the Agency to a certain segment of the employment marketplace, and this segment was in general contraction nationwide. In addition, the Agency's security arrangements required John Doe to continue utilizing the false name and background created by the Agency and the Agency, did not assist, as it had in the past, by talking with senior management of the prospective employer to disclose plaintiffs' true circumstances in order to facilitate employment opportunities. To date, John Doe's extensive efforts to find new employment have been unsuccessful.

4.20 As set forth in Section V below, plaintiffs for more than two years attempted in good faith to work within the confines of the Agency to resolve their situation. In the meantime, plaintiffs' health and financial circumstances have deteriorated and are cause for grave concern. Plaintiffs are forced to subsist on their limited retirement savings and what few earnings they

have managed to obtain. Yet, given their increasing ages and health concerns, plaintiffs will be unable to replenish those resources even if the Agency assists in locating suitable employment immediately. If the Agency does not provide, at a minimum, the health and retirement safety net needed, plaintiffs soon will be destitute.

4.21 In spite of bleak prospects, John Doe continues to search for suitable employment. In an effort to further reduce their cost of living after his unemployment benefits ran out, after defendants wrongfully failed to renew assistance after John Doe's layoff, plaintiffs temporarily left the United States to live with one of their aging relatives in a former Eastern Bloc country in near subsistence level conditions. This was an act of desperation, as it greatly increased the risk to plaintiffs' personal security.

4.22 Defendants created the ongoing serious risk to plaintiffs' personal security by coercing plaintiffs to conduct intelligence activities that clearly fingerprinted them as having conducted espionage for the United States. As a result, the security service of their former country imposed a sanction on them that calls for either death or life imprisonment for John Doe and substantial time for Jane Doe. Plaintiffs are aware that sanctions by the aforementioned security service for some persons have been lifted following the end of the Cold War. Sanctions have not been lifted, however, for persons like plaintiffs who formerly occupied senior positions within the government and who were known to have conducted espionage activities. The continued presence of such sanctions presents a continuing danger to plaintiffs and causes them considerable concern and anxiety.

4.23 While temporarily living with a relative in an Eastern Bloc country following defendants' failure to renew assistance, John Doe obtained employment as an advisor to the president of a commercial company on matters related to international trade. The position provided a minimal salary, but also some prospect for improvement. After serving in this position for several months, John Doe came in direct contact with a former associate known to him to be, at least in the past, an officer of the state security service. In order to eliminate further contact with this individual and the associated threat to plaintiffs' personal security, John Doe immediately terminated his employment with the company.

4.24 At this same time, plaintiffs were experiencing health problems. The local medical facilities were hopelessly inadequate and were unable to treat plaintiffs' medical problems. The combination of the extreme concern and risk occasioned by the recognition of the former (or perhaps current) security service agent, the need to obtain competent medical treatment caused plaintiffs to return to the United States.

4.25 Since returning to the United States, plaintiffs have obtained temporary work for approximately three months. Aside from this income, plaintiffs have been living by borrowing against their limited retirement savings. John Doe still cannot find regular, professional work and Jane Doe is unable to do any physical work due to her medical condition. Plaintiffs' modest assets will soon be depleted if defendants are not compelled to resume assistance, and plaintiffs believe they will soon have no other choice than to leave the United States and go once again to an Eastern Bloc country in order to reduce their living expenses and to search for em-

ployment where they believe there is more opportunity under their unique circumstances. Plaintiffs have great concern and anxiety over such a move because it will greatly increase their odds of coming in contact with current or former security service agents who are aware of the sanctions against them.

V. THE AGENCY'S DEROGATION OF ITS CONSTITUTIONAL AND STATUTORY OBLIGATIONS

5.1 In February 1997, in accordance with the procedure prescribed by the Agency for making contact, plaintiffs wrote their Agency contact providing the details of their situation and asking for assistance.

5.2 Plaintiffs received no response from the Agency for nearly four months. When a response did come in June 1997, the Agency expressed regret that no funds were available to provide assistance. No other reason was given for not assisting plaintiffs as they requested. The Agency's letter stated in part:

> We are very sorry that it has taken this long to respond to your telephone calls and letter, but we have been in a state of transition and have been unable to give your problem our fullest attention until recently. We were very sorry to learn that you were laid off from your position. . . . Please be assured that we have carefully reviewed the information you submitted along with your contract with this organization and the benefits contained therein. . . . , we sympathize with the situation you now find yourself in but regret that due to our budget constraints, we are unable to provide you with additional assistance.

* * *

> We want you to know that this office has great respect for the people we serve and we remain grateful for your past service to this country.
>
> We continue to be concerned for your security and welfare and would hope to be flexible should you require assistance in the future.

5.3 When plaintiffs' further attempts at obtaining Agency assistance failed to produce any results, plaintiffs sought legal representation.

5.4 The Agency subsequently granted the undersigned counsel for plaintiffs security clearances for purposes of representing plaintiffs in their claim with the Agency.

5.5 During a meeting at which the security clearances were granted to the undersigned counsel, the Agency representative (an attorney from the office of General Counsel) purported to explain the Agency's unilateral determination that the benefits previously provided were adequate for the services rendered and that plaintiffs were entitled to no further benefits. The Agency's attorney did not at this time claim any budgetary problems. The Agency representative also showed the undersigned five documents, including two versions of Document One (one in English and one in plaintiffs' native language) and Document Two, claiming that these documents extinguished any rights plaintiffs may have had.

5.6 During this meeting, the Agency's attorney made false and misleading statements concerning plaintiffs' services and impugning plaintiffs' character. Plaintiffs' counsel responded to the extent they could based on the limited information available to them. The Agency's representative was unable to reply because,

as she said, she "was just a messenger" and had no substantive knowledge of the facts. Plaintiffs' counsel therefore requested an opportunity to meet with Agency persons who were (a) substantively knowledgeable and (b) empowered to make decisions. This request was denied. Instead, the Agency advised that plaintiffs could appeal the decision to the DCI.

5.7 Plaintiffs prepared an appeal to the DCI. In doing so, the following occurred.

(a) Plaintiffs' counsel repeatedly requested from the Agency copies of the regulations that governed the appeal process. These requests were ignored.

(b) Notwithstanding the obvious relevance of the PL-110 rules and regulations to plaintiffs' claim, the Agency has consistently denied or ignored plaintiffs' counsel's requests for copies of such rules and regulations.

(c) Plaintiffs' counsel repeatedly requested access to records classified within the level of security clearances granted plaintiffs' counsel. These requests were denied or ignored.

(d) Plaintiffs' counsel repeatedly requested access to the persons with personal knowledge of the relevant facts. These requests were denied or ignored.

(e) Plaintiffs' counsel requested face-to-face meetings with responsible Agency officials, with or without plaintiffs present, to discuss the relevant facts and circumstances. These requests were denied or ignored.

(f) Notwithstanding the considerable obstacles presented by the Agency's aforestated failures to provide even the most basic information, plaintiffs filed their appeal with the DCI on or about December 9, 1997. At the same time, plaintiffs requested an independent review by the Agency's Inspector General ("IG"). This request and follow-up requests for IG review have not, to plaintiffs' knowledge, resulted in any review by the IG.

(g) Subsequently, counsel for the Agency orally advised counsel for plaintiffs that the Deputy Director of Operations (not the DCI) had denied their appeal. Counsel for the Agency advised that a further appeal was possible to a panel of former Agency officials (referred to as the Helms Panel after its chairperson, former DCI Richard Helms). Being confused about the appeal process as a result of the inconsistent and contradictory oral information provided by the Agency, plaintiffs again requested copies of the regulations or rules governing such appeals. This request, like all before it, was ignored.

(h) Plaintiffs' counsel requested written confirmation of the Agency's determination of the appeal. This request was ignored.

(i) Plaintiffs pursued an appeal to the Helms Panel and, in doing so, renewed their requests for access to documents and persons and for a copy of regulations governing the appeal process. In addition, plaintiffs' counsel made repeated requests for an opportunity for plaintiffs themselves or, at a minimum, for counsel for plaintiffs to appear before the Helms Panel and present their case. Plaintiffs' counsel also made repeated requests for an oppor-

tunity to confront witnesses—whose identities could, if necessary, be concealed. These requests were directed both to the Agency and to the Helms Panel. All such requests were either denied or ignored.

(j) Counsel for the Agency subsequently advised plaintiffs' counsel orally that the DCI had determined, based on the recommendation of the Helms Panel, that the Agency should provide certain benefits to plaintiffs for a period not to exceed one year, and nothing thereafter.

(k) Plaintiffs' counsel was allowed to read the DCI's written decision at a secure location in the Washington D.C. area. Even though the DCI's decision document did not bear any classification, the Agency refused to provide plaintiffs or plaintiffs' counsel with a copy of the document.

(l) Counsel for the Agency subsequently advised that in order for plaintiffs to accept the benefits of the DCI's decision, they would have to execute full and complete waivers and releases. The DCI's decision document itself makes no mention of waivers or releases.

(m) Plaintiffs' counsel subsequently wrote counsel for the Agency asking for clarification of whether the appeal process and the DCI's decision represented an adjudication of plaintiffs' rights, and if so, how such an adjudication could be predicated on a demand for a waiver and release. The Agency has not responded.

5.8 On information and belief, the documents the Agency elected to show plaintiffs' counsel were only those documents that the Agency believed were

exculpatory as to its conduct. Inculpatory documents were not shown to plaintiffs' counsel. The decision regarding what to show and not show plaintiffs' counsel was self-serving, and not based on any legitimate concern for protecting intelligence sources and methods.

5.9 The Agency's response to an inquiry from the United States Senate regarding plaintiffs' claims was contained in the third document shown to the undersigned counsel ("Document Three"). Document Three was misleading and omitted material facts important to fair consideration of plaintiffs' request for assistance.

5.10 On information and belief, the factual information provided by Agency staff to the Deputy Director of Operations and the DCI as part of the official review of plaintiffs' appeals was misleading and omitted material facts important to plaintiffs' petition for assistance.

5.11 On information and belief, the factual information provided by the Agency to the Helms Panel was misleading and omitted material facts important to plaintiffs' appeal.

5.12 On information and belief, substantial documentation relevant to plaintiffs' appeal is available that is unclassified or classified within the security clearance level granted to plaintiffs' counsel. This information was not disclosed to plaintiffs' counsel and, on information and belief, not presented to the Helms Panel.

5.13 On information and belief, persons exist whose present or past affiliation with the Agency is not classified and who have knowledge of facts relevant to plaintiffs' appeal; however, plaintiffs' counsel were not allowed to interview such persons and, on information

and belief, such persons did not testify before or otherwise provide information to the Helms Panel.

5.14 Defendants treat corporations, entities or persons with whom the United States has a contract or other claim against the United States involving secret services or goods differently from defectors like plaintiffs who have a claim against the United States relating to secret services.

5.15 Defendants effectuate such unequal treatment by selectively invoking the Totten Doctrine to bar judicial enforcement of contracts involving such secret services in cases involving defectors, but not for those involving corporations, entities or persons that supply the government with secret goods or services.

5.16 When litigating with corporations, entities or persons other than defectors, defendants cooperate to facilitate the lawful resolution of such claims, whether in court, in an administrative setting, or in private dispute resolution. In so doing, defendants cooperate with claimants to take special precautions to protect classified information by, for example, sealing court rooms, sweeping them for listening devices, and providing security clearances for attorneys. In this manner, the disputes are resolved under law with due process. Classified information, including information relating to intelligence sources and methods, is utilized in the process without disclosure to unauthorized persons.

5.17 In contrast, defendants do not similarly cooperate with defectors who have claims against them involving secret services. Defectors are accorded no due process and their claims are not resolved in accordance with the law.

5.18 The unequal treatment of defectors constitutes discrimination based on national origin and is therefore subject to strict scrutiny. To the extent dispute resolution with defectors requires special considerations, defendants have not properly adopted procedures narrowly drawn to meet any compelling need to protect intelligence sources and methods or classified information.

5.19 There is no legitimate or rational basis to justify defendants' unequal and discriminatory treatment of defectors. To the extent dispute resolution with defectors requires special considerations, defendants have not properly adopted procedures rationally related to fulfilling a legitimate need.

5.20 Defendants have a duty to protect plaintiffs because defendants' actions created a special relationship between them and plaintiffs, and because defendants' actions and lack of action created and continue to enhance the danger to plaintiffs. Defendants have created a special relationship with plaintiffs by placing plaintiffs in a vulnerable situation where plaintiffs are dependent on defendants for basic necessities and even their lives. Defendants are therefore obligated by law to provide for plaintiffs' basic needs and protect plaintiffs from deprivations of liberty. By coercing plaintiffs to undertake espionage activities that ensured their former government would discover what had occurred, defendants created a substantial danger to plaintiffs' personal security. Such danger continues today and will continue for the rest of plaintiffs' lives. Defendants violate the Constitution by being deliberately and recklessly indifferent to this continuing danger.

5.21 As a result of their relationship with defendants, plaintiffs are forced to live under false names

with false identities, and cannot subsist in this country now and as they age without assistance from defendants, which assistance has been wrongfully withheld. By depriving plaintiffs of assistance, defendants have further created and enhanced the danger to plaintiffs. Defendants' failure to provide basic financial and other benefits and to otherwise discharge their constitutional obligation to ensure plaintiffs' personal security compels plaintiffs to travel to Eastern Europe to search for employment and to further reduce their already minimal living expenses, so that they have some resources, however limited, on which to survive when they are no longer able to work at all. In Eastern Europe, plaintiffs' chances of being identified by current or former agents of their former country and subjected to sanctions or blackmail, involving grave risk to their physical security, is greatly increased. Defendants' actions or lack of action are not narrowly tailored to further any compelling state interest, nor are they even rationally related to a legitimate government end.

VI. CLAIMS

6.1 Equal Protection.

Defendants' actions deprive plaintiffs of the equal protection of law guaranteed under the Fifth Amendment to the United States Constitution.

6.2 Due Process.

Plaintiffs have a constitutionally protected liberty and property interest. Defendants' actions violate the Due Process Clause of the Fifth Amendment to the United States Constitution by depriving plaintiffs—without a modicum of fair process—of their constitutionally protected interest in the financial assistance, health and other benefits, and security established by

statute, regulation or Agency conduct, and repeatedly promised and initially provided by the Agency. Defendants' actions further violate the Due Process Clause of the Fifth Amendment to the United States Constitution because defendants have a special relationship with plaintiffs and because defendants actions or lack of action have created and now enhance the danger to plaintiffs. Because of the highly vulnerable situation in which plaintiffs have been placed by defendants, defendants have a constitutional duty to protect plaintiffs' fundamental right to personal security and to provide for plaintiffs' basic needs. Defendants have breached this duty.

6.3 Injunctive Relief.

As a result of defendants' actions, plaintiffs have been irreparably injured and will continue to suffer irreparable injury until such time as they are afforded a constitutionally adequate hearing of their rights as hereinbefore alleged and until defendants cease depriving plaintiffs of their fundamental right to personal security and fulfill their constitutional duty to provide for plaintiffs' basic needs. Plaintiffs are without an adequate remedy at law and are entitled to a preliminary injunction and a permanent injunction, as set forth below in the Prayer.

6.4 Declaratory Judgment.

Plaintiffs are entitled to a declaratory judgment pursuant to 28 U. S. C. § 2201 as set forth below in the Prayer.

6.5 Mandamus.

Plaintiffs are entitled pursuant to 28 U. S. C. § 1361 to an order of mandamus directed to defendant Tenet to carry out his non-discretionary obligations and to cease

depriving plaintiffs of their constitutional rights as requested below in the Prayer.

VII. RELIEF

Plaintiffs pray for the following relief.

7.1 Injunctive Relief.

a. A preliminary injunction requiring the Agency to provide to plaintiffs financial support on a monthly basis equal to the financial support last supplied to plaintiffs by the Agency during a time when plaintiff John Doe was unemployed (adjusted by application of subsequent cost of living index changes) from February 1997 to the date this matter is concluded or until further order of this Court, and

b. A permanent injunction providing the same relief until such time as the plaintiffs have been provided a constitutionally adequate internal Agency hearing on their claim under the rule of law, and until defendants fulfill their constitutional duty to protect plaintiffs' personal security and provide for plaintiffs' basic needs.

7.2 Declaratory Relief.

A declaratory judgment that:

a. The Agency failed to provide a constitutionally adequate process for adjudicating plaintiffs' protected interests and thereby violated plaintiffs' constitutional rights,

b. The decision of Defendant Tenet in plaintiffs' prior appeal is null and void,

c. The Agency is required to provide constitutionally adequate procedures for the conduct of

internal confidential administrative proceedings relating to the adjudication of defector grievances,

d. At a minimum, the Agency's procedures governing the internal confidential administrative procedures must provide for:

i. Written procedures for presenting, prosecuting and adjudicating claims by defectors relating to secret services, copies of which procedures are available to the defector and defector's cleared counsel;

ii. Provision of appropriate security clearances for counsel for the defector to the extent such persons meet the requirements for such clearances and the DCI determines that the provision of such clearances will not harm national security or intelligence sources and methods;

iii. Access by the defector and defector's counsel to unclassified information that would normally be discoverable;

iv. Access by the defector's counsel who have been cleared by the Agency for access to classified information, to that information in the Agency's possession that would normally be discoverable, but for the classification, provided that the DCI may provide for necessary safeguards and limitations on counsel's use of such information, including a proscription from disclosure to the defector, if the DCI determines that such restrictions are necessary for national security purposes or to protect intelligence sources and methods;

v. Access by the defector and the defector's counsel to persons whose present or past affiliation with the Agency is not then classified if such persons may have information that would normally be discoverable;

vi. Access by the defector and the defector's counsel who have received security clearances to persons whose present or past affiliation with the Agency is then classified if such persons may have information that would normally be discoverable under the civil rules of discovery, but for their classified status, provided that the identity of such persons may be concealed and other precautions taken to protect the individual's identity and to otherwise protect intelligence sources and methods as the DCI may deem appropriate;

vii. An opportunity for the defector and the defector's cleared counsel to appear at the hearing, call witnesses, present evidence and argument and to cross examine witnesses;

viii. A final decision by the DCI which shall be written and shall include findings of fact and conclusions of law addressing each of the defector's claims according to law;

ix. An opportunity for the defector and the defector's cleared counsel to read the DCI's final decision and the supporting findings of fact and conclusions of law and the further right to seek reconsideration of the same if the defector believes that a material error as

to fact or law has occurred or that a manifest injustice has been done; and

x. An independent and timely review by the Agency's Inspector General at the conclusion of the internal Agency proceedings if requested by the defector.

e. The holding of *Totten* v. *United States* and its progeny relating to the judicial enforcement of contracts for secret services do not apply to internal confidential administrative hearings conducted by the Agency and that if contract claims relating to secret services are presented in such internal confidential administrative hearings such claims as well as other lawful claims should be adjudicated on the merits according to law.

f. Defendants are violating plaintiffs' constitutional rights by failing to protect plaintiffs' personal security and/or to provide for their basic needs, and that defendants are directed to fulfill these constitutional obligations.

7.3 Mandamus.

An order of mandamus compelling defendant Tenet to:

a. Adopt internal Agency regulations, of a classified or unclassified nature, as Defendant Tenet may determine is required according to law, to implement the judgment of this Court;

b. Conduct a constitutionally adequate hearing of plaintiffs' claims according to such internal Agency regulations and procedures as may be adopted by the Agency in compliance with the

judgment of this Court and adjudicate plaintiffs' claims under the rule of law;

c. Cease depriving plaintiffs of their constitutional rights and to protect plaintiffs' personal security and provide for their basic needs.

7.4 Other Relief

Such other interim or permanent relief as the Court may deem just and proper, including the award to plaintiffs of their costs and reasonable attorneys' fees.

DATED this 30th day of March, 2000.

PERKINS COIE LLP

By /s/ STEVEN W. HALE
STEVEN W. HALE, WSBA #5993
Elizabeth A. Alaniz, WSBA #21096
Attorneys for Plaintiffs

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Civil Action No. C99-1597L

JOHN DOE AND JANE DOE, PLAINTIFFS

v.

GEORGE J. TENET, ET AL., DEFENDANT

DECLARATION OF WILLIAM H. MCNAIR

Before: Judge LASNIK

I, William McNair, hereby declare and say:

1. I am the Information Review Officer ("IRO") for the Directorate of Operations ("DO") of the United States Central Intelligence Agency ("CIA" or "Agency"). The Directorate of Operations is the CIA's Clandestine Service, and is responsible for, among other things: conducting foreign intelligence and counterintelligence activities through various means, including human sources; conducting covert action; conducting liaison with foreign intelligence and security services; supporting clandestine technical collection; and coordinating CIA support to the Department of Defense. I have held operational and executive positions in the intelligence agencies of the United States Government since 1962, and with the CIA since 1982. I served as Associate TRO for the DO from July 1993 until I was appointed to my present position in February 1994.

2. As DO/IRO, I am responsible for the review of records maintained by offices in the DO that may be responsive to Freedom of Information Act ("FOIA") or Privacy Act requests, as well as to requests from the Department of Justice in criminal or civil litigation. I am also responsible for conducting classification reviews with respect to information originated by the DO, or otherwise implicating DO interests, including any and all Agency regulations or statutes that govern Agency actions towards Agency employees, assets, sources, defectors, etc. I am authorized to sign declarations on behalf of the Agency regarding the existence of any such regulations or statutes, and to discuss or describe the contents of any relevant regulations or statutes under the cognizance of the Agency.

3. Through the exercise of my official duties, I have become familiar with the major issues in this civil action, and with the allegations of plaintiffs that they are entitled to lifetime benefits from the Agency. The statements herein are based upon my personal knowledge, information made available to me in my official capacity, the advice and counsel of the CIA Office of General Counsel, and conclusions I reached and determinations I made in accordance therewith.

4. I have been informed that plaintiffs allege that they committed espionage upon the request of the Agency, were sponsored by the Agency to defect to the United States pursuant to Section 7 of the Central Intelligence Agency Act of 1949, 50 U.S.C. §403h (commonly known as "PL-110"), and did in fact defect to the United States where they now reside. I have been informed that plaintiffs further allege that they are entitled to lifetime benefits from the Agency pursuant to PL-110, an Agency policy or regulation established

pursuant to PL-110, or some other unspecified Agency policy or regulation providing for lifetime benefits to defectors or a certain class thereof.

5. The Directorate of Operations is the CIA directorate responsible for the processing of individuals brought into the United States by CIA under the authority of PL-110. As the court may be aware, other federal agencies may bring individuals into the United States under PL-110. As DO/IRO, I have full access to all information concerning the Agency's responsibilities under PL-110. I have specifically reviewed such information for any regulations or internal CIA policies concerning PL-110 with respect to any provisions of subsistence assistance to be provided to individuals brought into the United States under the authority of PL-110. I can inform the court unequivocally that there are *no* Agency or other US federal regulations that require the CIA to provide lifetime subsistence assistance to individuals brought into the United States under the authority of PL-110. **Neither PL-110, nor any other law, statute, regulation, internal policy, unstated principle or anything else has ever before, or does now, obligate the Agency to provide any form of lifetime financial assistance to individuals brought into the United States by CIA under the authority of PL-110.**

6. There is an agreement between the CIA and the Department of Justice in which CIA promised to DOJ that CIA would ensure that individuals whom the CIA brought into the United States under the authority of PL-110 would not become public charges before such time that they either attained United States citizenship, or were eligible to become United States citizens. The Agency has a regulation to this effect as well. However, I have been informed that plaintiffs in this

case claim that they are presently United States citizens.

7. On page 10, lines 12-17, of this Court's 7 June 2000 Order, the Court states that, because the Agency has reviewed and approved "for public filing all papers filed by plaintiffs thus far" that "the Court is confident that the case may be litigated without requiring the disclosure of national security secrets. . . ." I wish to explain the purpose of the Agency's review of the Complaint filed in this case.

8. I am the individual who, on behalf of the Agency, has conducted the review of the plaintiffs' complaint and other pleadings and posed no objection to the filing of such pleadings in open court. The CIA does not conduct a classification review, per se, of court pleadings in cases such as these. Plaintiffs pleadings contained mere allegations which, absent official US Government confirmation, did not constitute classified information. The purpose of my review, therefore, was to determine whether certain allegations, in themselves, could be so harmful to national security that I should object to their being disclosed. Such an allegation might be to name a specific individual to be a CIA officer. Whether or not true, such an allegation can jeopardize the physical safety and financial well-being of the named person, as well as his or her family. In cases when the allegation is true, the potential threat also extends to intelligence sources with whom that officer had contact. Thus, my review of a pleading generally looks to those allegations that, regardless of their truth, would threaten the national security or the safety and well-being of innocent persons. Individuals submit pleadings to CIA for such a review either voluntarily or because they have been granted a security

clearance by CIA and, as a condition of receiving such a clearance, are required to submit their pleadings. (In which category plaintiffs and their counsel fall can only be discussed in a classified pleading.)

9. In this case, any Agency response to the factual assertions made in any of plaintiffs' pleadings, whether to either confirm or deny the allegations contained therein, would be classified information and could not be filed in open court. The reason for this is that, while mere allegations made by individuals about the Agency are not classified in most circumstances, when such allegations are either confirmed or denied by the Agency (or by the United States Government in general) they then bear the imprimatur of an official statement, at which point, at least in the instant case, national security issues would be raised and the matters would become classified.[1]

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[1] Although not necessarily self-evident, the denial of such a relationship would itself reveal classified information. If the CIA were to deny a relationship every time one did not exist, then any time the Agency refused to confirm or deny a relationship, it would be tantamount to an admission that such a relationship does in fact exist. Such a procedure would obviously reveal the very information that the CIA seeks to protect (i.e. a current or past covert relationship) and would risk national security.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 17 day of July 2000

/s/ WILLIAM H. MCNAIR
WILLIAM H. MCNAIR
Information Review Officer
and
Records Validation Officer
Central Intelligence Agency